SUPREME COURT, U. S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-283

EMPRISE CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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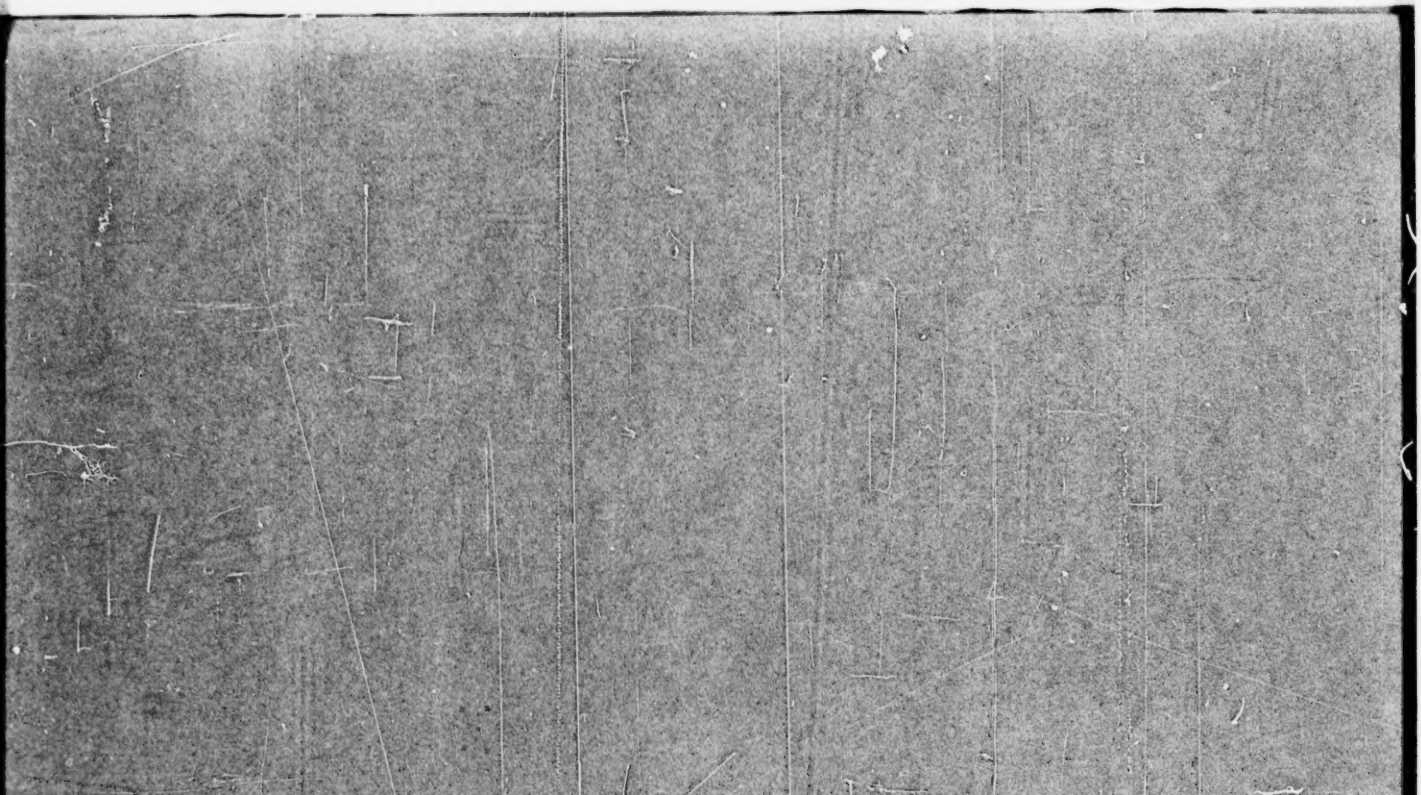

INDEX

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved.. 2

Questions Presented 2

Statement 3

1. The Prosecution's Evidence 5
2. The Trial Proceedings 7
3. The Court of Appeals 9

Reasons for Granting the Writ 9

I. The Court of Appeals Expansively Construed the Travel Act To Embrace Activities Not Intended by Congress 9

II. The Court of Appeals, in Direct Conflict with Other Circuits, Erroneously Held That Conspiracy To Violate the Travel Act Does Not Require Specific Intent To Violate State Law 15

III. The Court of Appeals, in Direct Conflict With the Sixth Circuit, Erroneously Held One Corporation Criminally Liable for the Acts of Another. 17

IV. The Court of Appeals Erroneously Refused to Recognize the Unconstitutionality of Acts Which, Both Singly and in Sum Total, Denied Petitioner's Fifth and Sixth Amendment Rights 21

Conclusion 28

TABLE OF AUTHORITIES

Cases: Page

Bachellar v. Maryland, 397 U.S. 564 (1970) 28
Berger v. United States, 295 U.S. 78 (1935) 24
Bruton v. United States, 391 U.S. 123 (1968) 24
Campbell v. United States, 373 U.S. 487 (1963) 25
Chapman v. California, 386 U.S. 18 (1967) 23
Clay v. United States, 403 U.S. 698 (1971) 27
Estes v. Texas, 381 U.S. 532 (1965) 23
Giglio v. United States, 405 U.S. 150 (1972) 25
Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973) 18
Lewis v. United States, 146 U.S. 370 (1892) 24
Mares v. United States, 383 F.2d 805 (10th Cir. 1967) .. 23
Melrose Distillers, Inc. v. United States, 359 U.S. 271 (1959) 18, 19
Mooney v. Holohan, 294 U.S. 103 (1935) 25
Rewis v. United States, 401 U.S. 808 (1971) ..... *passim*
Sheppard v. Maxwell, 384 U.S. 333 (1966) 23
State v. Capital City Dairy Co., 62 Ohio 350, 56 N.E. 651 (1900), aff'd, 183 U.S. 238 (1902) 5
State v. Delmar Jockey Club, 200 Mo. 34, 92 S.W. 185 (1905) 5
Stromberg v. California, 283 U.S. 359 (1931) 28
Turf Center, Inc. v. United States, 325 F.2d 793 (9th Cir. 1963) 16
United States v. Alsondo, 486 F.2d 1339 (2d Cir. 1973), cert. granted, sub. nom., United States v. Feola, No. 73-1123, 42 U.S.L.W. 3584 16
United States v. Archer, 486 F.2d 670 (2d Cir. 1973) .. 12, 13
United States v. Bass, 404 U.S. 336 (1971) 10, 14
United States v. Bergland, 318 F.2d 159 (7th Cir.), cert. denied, 375 U.S. 861 (1963) 9
United States v. Carter, 311 F.2d 934, cert. denied, 373 U.S. 915 (1963) 17
United States v. Cigarette Merchandisers Ass'n, 136 F.Supp. 214 (S.D.N.Y. 1955) 19
United States v. Emmons, 410 U.S. 396 (1973) 10
United States v. Gordon, 464 F.2d 357 (9th Cir. 1972) 14
United States v. Hanon, 428 F.2d 101 (8th Cir. 1970) 16
United States v. Hawthorne, 356 F.2d 740 (4th Cir. 1966) 16

Page

United States v. McCoy, 429 F.2d 739 (D. C. Cir. 1970) 24
United States v. Miller, 379 F.2d 483 (7th Cir. 1967).. 16
United States v. Nardello, 393 U.S. 286 (1969) 11
United States v. Palladino, 475 F.2d 65 (1st Cir. 1973) 24
United States v. Roselli, 432 F.2d 879 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971)..... 10
United States v. Ryan, 455 F.2d 728 (9th Cir. 1972)... 25
United States v. Stagman, 446 F.2d 489 (6th Cir. 1971) 15, 16
United States v. Stone, 452 F.2d 42 (8th Cir. 1971).... 19
United States v. Thomas, 463 F.2d 1061 (7th Cir. 1972) 23
United States v. Union Supply Co., 215 U.S. 50 (1909) 4
United States v. Wechsler, 392 F.2d 344 (4th Cir. 1968) 16
Yates v. United States, 354 U.S. 298 (1957)..... 28

CONSTITUTIONAL PROVISIONS AND STATUTES:

Fifth Amendment, United States Constitution.....*passim*
Sixth Amendment, United States Constitution.....*passim*
18 U.S.C. § 111 16
18 U.S.C. § 1511(6)(1) 14
18 U.S.C. § 1952 ..... *passim*
18 U.S.C. § 1955 .....13, 14
18 U.S.C. §§ 1961-63 14
18 U.S.C. § 323 7
18 U.S.C. § 3500 25
D.C. Code Ann. §§ 25-118, 47-2345 (1973) 5
Del. Code Ann. Tit. 4, § 561(b) (1953) 5
Nevada Rev. Stat. § 463.200 11
Nevada Rev. Stat. § 463 360 11
Nevada Rev. Stat. § 463.530 6
N.Y. Alco. Bev. Control Law § 126 (McKinney 1970).. 5
N.Y. Bus. Corp. Act § 1101(a)(2) (McKinney 1970).. 5
N.Y. Bus. Corp. Law § 906(b)(3)..... 9
Tex. Bus. Corp. Act, Arts. 7.01, 8.16 (1956)..... 5

MISCELLANEOUS:

American Bar Association Standards Relating to the Prosecution Function, Approved Draft, Sec. 3.5, 5 (February 1971) 24

Page

Miller, *The "Travel Act": A New Statutory Approach to Organized Crime in the United States*, 1 Duquesne U. L. Rev. 181 (1963) 12
Legislation Relating to Organized Crime, Hearings on H. R. 468 etc. before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess. (1961) 12
Sayre, *Criminal Responsibility for the Acts of Another*, 43 Harv. L. Rev. 689 (1930) 20, 21
"The Collateral Consequences of a Criminal Conviction," 23 Vand. L. Rev. 929 (1970) 4
37 Yale L. J. 237 (1927) 5
45 Am. Jur. 2d § 150 4

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EMPRISE CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Emprise Corporation prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 30, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is printed as Appendix A in the separately-filed Appendix to this petition. In denying a petition for rehearing, the Court of Appeals made a number of substantive changes in its original opinion; those changes are printed as Appendix B (pp. 94a *et seq.*) in the separately-filed Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on April 30, 1974. App. A, p. 1a. On May 14, 1974, Petitioner Emprise Corporation filed a timely Petition for Rehearing and Suggestion of Appropriateness of Rehearing in Banc. The Court of Appeals denied said Petition on July 18, 1974 (App. B, p. 94a), but notice of the denial was not sent to the parties until July 25. Therefore, pursuant to proper motions, the court revised the date of the denial nunc pro tunc to July 25, 1974. App. C, p. 98a. In the meantime, on August 8 Mr. Justice Douglas, pursuant to motion, extended petitioner's time in which it could file this petition from August 17 to September 16, 1974. App. E, p. 102a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the United States Constitution; the Travel Act, 18 U.S.C. § 1952, and the relevant portions of the applicable Nevada statutes are set forth in Appendix F, pp. 103a *et seq.*

QUESTIONS PRESENTED

The federal Travel Act, 18 U.S.C. § 1952, makes it a federal crime to travel in interstate commerce with intent to facilitate the "promotion, management, establishment or carrying on" of a "business enterprise involving gambling offenses" in violation of local law. The questions presented are:

1. Whether it is an unjustifiably "expansive interpretation" (*Rewis* v. *United States*, 401 U.S. 808, 809 (1971)) of the Travel Act to read the words "gam-

bling offenses" as covering corporate operation of a licensed gambling casino in Nevada when the sole alleged violation related not to any aspect of the substantive crime of gambling but entirely to the omission of certain information in the corporation's application for a license.

2. Whether conspiracy to violate the federal Travel Act, 18 U.S.C. § 1952, requires proof of specific intent to violate state law, as held by the Sixth Circuit and other Courts of Appeals, or whether no such proof is necessary, as held by the court below.

3. Whether the petitioner corporation was properly held criminally responsible for acts committed by and on behalf of another corporate entity which had been merged into the petitioner one year before indictment for business reasons having nothing whatever to do with the alleged violation.

4. Whether petitioner was denied due process under the Fifth Amendment and its right to a jury trial under the Sixth Amendment by the conduct of the prosecution prior and subsequent to trial and by the conduct of the prosecutor and the court at trial—conduct which included illegal wiretapping, the engendering of prejudicial publicity, interrogations of the jury out of the presence of defendants and their counsel, and improper remarks by the prosecutor.

STATEMENT

Petitioner is a New York corporation that was known, until March 1970, as High Park Corporation. Its business consists primarily of the operation of concessions for food and liquor at football stadiums, baseball parks, race tracks, airports and the like through-

out the United States, Canada and England. After an eleven-week trial by jury, the petitioner corporation and six individual co-defendants were found guilty of conspiring to violate the federal Travel Act, 18 U.S.C. § 1952,[1] and the corporation was sentenced to pay a $10,000 fine. The essence of the proof against petitioner was that a former subsidiary whose assets petitioner had acquired by merger in March 1970 had, four years previously, loaned money to three of the thirty shareholders of a Nevada corporation called Vegas Frontier, Inc. ("VFI"), to enable them to purchase stock and debentures in VFI, with knowledge that VFI would be licensed to operate a gambling casino in Las Vegas, Nevada, and with the further alleged knowledge that two other persons (co-defendants Zerilli and Polizzi) would have a "hidden interest" in VFI.[2]

This conviction, under an improper extension of a federal criminal statute based upon the acts of a subsidiary which the petitioner corporation neither ratified nor approved in advance, could possibly jeopardize petitioner's ability to operate in the future.[3]

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[1] The individual defendants were also convicted on substantive counts.

[2] There was no proof of any financial interest of Zerilli or Polizzi. The finding of their "hidden interest" arises from evidence that they participated in (or "controlled") the management of VFI. There was no evidence, direct or circumstantial, that either petitioner or its former subsidiary had knowledge that Zerilli or Polizzi participated in the management of VFI.

[3] Petitioner presently holds 107 alcoholic beverage licenses (as well as other licenses) in 26 states and the District of Columbia. As a result of the conviction, 14 of these jurisdictions have commenced revocation hearings or indicated their intention to do so. See *United States* v. *Union Supply Co.*, 215 U.S. 50 (1909); "The Collateral Consequences of a Criminal Conviction," 23 Vand. L. Rev. 929, 1010-11 (1970); 45 Am. Jur. 2d

1. *The Prosecution's Evidence*—Two residents of Las Vegas named Friedman and Richardson became interested in 1965 in financing, constructing and operating a licensed gambling casino in Las Vegas to be named the Frontier Hotel. They formed the corporation known as VFI to own and operate the casino and to secure from the Nevada State Gaming Commission the license needed for such activity. Two of the many people to whom they attempted to sell stock and debentures in VFI were the defendants Zerilli and Polizzi, who had previously shown an interest in purchasing part ownership of a gambling casino in Nevada. Zerilli and Polizzi came to Las Vegas in March 1966 and, together with Friedman and Richardson, consulted an attorney in Reno who, after obtaining background information from Zerilli and Polizzi, discussed their proposed investment informally with members of the Nevada Gaming Control Board. (This is a regular procedure permitted under Nevada practice.) The

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§ 150. Examples of jurisdictions where numerous statutory provisions allow for the revocation of such licenses are the District of Columbia and the states of New York and Delaware. E.g., D.C. Code Ann. §§ 25-118, 47-2345 (1973); Del. Code Ann. tit. 4, § 561 (b) (1953); N.Y. Alco. Bev. Control Law § 126 (McKinney 1970).

As a matter of fact, the laws of most states allow for the involuntary dissolution of a domestic corporation or the revocation of the certificate of authority of a foreign corporation if it engages in criminal conduct. *E.g.*, Tex. Bus. Corp. Act, arts. 7.01, 8.16 (1956) and N.Y. Bus. Corp Act § 1101 (a) (2) (McKinney 1970). See *State* v. *Capital City Dairy Co.*, 62 Ohio 350, 56 N.E. 651 (1900), aff'd, 183 U.S. 238 (1902). Some states have also initiated quo warranto proceedings, enjoining corporations from exercising corporate functions or from engaging in some particular corporate activity. See 37 Yale L. J. 237, 244 (1927); *State* v. *Delmar Jockey Club*, 200 Mo. 34, 92 S.W. 185 (1905).

While we believe that both law and equity should preclude each of these sanctions, and that none of them would be warranted in this case, the dangers remain.

attorney reported that there were "problems" with Zerilli's and Polizzi's ownership of interests in VFI.

It is an admitted fact that Zerilli and Polizzi did not purchase VFI stock or debentures or otherwise make any financial investment. The prosecution's theory was that the actions of the defendants thereafter were directed toward securing for Zerilli and Polizzi substantial participation in the control of the management of VFI from which it could be inferred that they had some kind of an interest in VFI, and that Nevada law was violated by the failure of Zerilli and Polizzi to obtain separate gambling licenses in addition to the VFI corporate license. The Court of Appeals rejected this theory (which was the only basis for conviction on the instructions submitted to the jury), but found that Zerilli and Polizzi did have "hidden interests", and held that Nevada law was violated by failing to make disclosure of such interests in the corporate license application. Under either theory, the operation of the casino in these circumstances assertedly constitutes the "gambling offense" upon which jurisdiction under the federal Travel Act rests.

On July 5, 1967, the license for VFI was signed and issued to be effective July 27, 1967. Tr. 3090-3094. As of July 1, 1967, Nevada law no longer required investigation by the Gaming Control Board of a corporation's stockholders or of any other person who might have a "direct or indirect" interest in a corporation holding a license. Nev. Rev. Stat. § 463.530. No gambling took place at the Frontier Casino before the license was issued, and the jury was instructed (without objection from the prosecution) that "since in this case a license was issued to the corporation VFI, any gambling conducted by or through VFI would not be illegal and

would not be in violation of the statute." Tr. 8798.[4] The Frontier Casino opened under VFI management on July 27, 1967. The entire operation was sold to the Hughes Tool Company on November 27, 1967.

2. *The Trial Proceedings*—On February 26, 1971, an indictment was returned in the Central District of California charging "Emprise Corporation" in one count with conspiracy to violate the federal Travel Act. The individual defendants were also charged with the conspiracy, and some of them were in addition variously charged with substantive Travel Act offenses in nine additional counts. After the prosecution advised that the reference in the indictment was to the Emprise Corporation which had been the subsidiary of High Park Corporation and which no longer existed,[5] motions to dismiss were filed. The indictment was then dismissed for lack of personal jurisdiction over the former subsidiary corporation. The prosecution appealed and then abandoned its appeal, choosing instead to file an information on October 14, 1971, charging the former High Park Corporation (now called Emprise) with the same conspiracy alleged in the indictment.[5a] The opening paragraph of the information squarely relied on a theory of vicarious liability:

> The defendant is a corporation originally incorporated pursuant to the laws of the State of

[4] The theory of Nevada law violation asserted in the instructions and in the evidence and argument was that Zerilli and Polizzi should have obtained separate gambling licenses. Tr. 2998-3001, 8693-94, 8768-69, 8774, 8810.

[5] The court below repeatedly referred to High Park's subsidiary as "old Emprise" and to petitioner as "new Emprise." We have deliberately avoided these designations because we believe they unfairly imply a greater identity between the two companies than actually existed.

[5a] The District Court had subject matter jurisdiction under 18 U.S.C. § 3231.

> New York, under the name High Park Corporation. It is the surviving corporation of a merger effectuated March 1, 1970 (pursuant to the laws of the State of New York) whereby a corporation then existing under the laws of the State of New York known as EMPRISE CORPORATION (hereinafter referred to throughout this paragraph as 'original' EMPRISE CORPORATION), a wholly owned subsidiary of High Park Corporation, merged into said High Park Corporation. Thereafter, on or about March 17, 1970, High Park Corporation duly changed its name to Emprise Corporation. It was the original EMPRISE CORPORATION which committed the conspiratorial acts charged below. Pursuant to the laws of the State of New York, the now existing EMPRISE CORPORATION, as the survivor of the previously described merger between original EMPRISE CORPORATION and High Park Corporation, is named as the defendant herein.

Petitioner then moved to dismiss on the ground that it had, under the information, committed no offense and that it could not be held vicariously liable merely because of its merger with the alleged wrongdoer. The court denied the motion and required petitioner to stand trial along with the six individual defendants.

Consistently with the opening paragraph of the information, the proof at trial showed no acts by High Park Corporation (now called Emprise), but only by the subsidiary. The judge charged the jury that the subsidiary's guilt was attributable to the petitioner (Tr. 8737-38):

> You have heard evidence in this case about a merger whereby the Emprise Corporation which existed at the time of the alleged offense, merged into its parent corporation in 1970. You need not concern yourselves with the legal effect of that merger. If, in accordance with the evidence and

these instructions, you find beyond a reasonable doubt that the Emprise Corporation which existed at the time of the criminal acts alleged here did commit the criminal acts as charged then you should return a verdict of guilty as against the corporate defendant.

3. *The Court of Appeals*—On appeal, the Ninth Circuit affirmed the convictions in a tripartite 78-page opinion, finding at least a dozen errors but holding them all harmless. On the merger issue, the court relied on New York law, interpreting that State's statutes to permit "the maintenance of a prosecution against the surviving corporation for crimes allegedly committed by a constituent corporation." App. A, p. 83a.[6] The court also held on the Travel Act question that defendants had engaged in the statutorily prohibited "unlawful activity," here a "business enterprise involving gambling offenses," even though the gambling conducted by VFI was legal. The court refused to consider the extensive legislative history indicating a contrary reading of the statute, stating, "The statutory language is clear." App , A, pp. 13a-14a.[7]

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Expansively Construed the Travel Act To Embrace Activities Not Intended by Congress.

The decision below has applied the federal Travel Act in a manner that conflicts with the principles and policies established by this Court when it construed the

[6] "Constituent corporation" is a term taken directly from the New York statute, Business Corporation Law § 906(b)(3), which implies no necessary prior relationship between the "constituent" and the survivor.

[7] *But see Rewis* v. *United States*, *supra*, 401 U.S. at 811-812; *United States* v. *Borland*, 318 F.2d 159, 161 (7th Cir.), *cert. denied*, 375 U.S. 861 (1963).

same law in *Rewis* v. *United States, supra,* and when it subsequently construed other federal criminal statutes (in reliance on *Rewis*) in *United States* v. *Bass,* 404 U.S. 336 (1971), and (in reliance on *Bass*) in *United States* v. *Enmons,* 410 U.S. 396 (1973). In all of these very recent cases, this Court emphasized that federal criminal statutes should not, in the absence of the clearest indication, be read "to effect a significant change in the sensitive relation between federal and state criminal jurisdiction" or to "overextend limited federal police resources." 404 U.S. at 349; see 401 U.S. at 812; 410 U.S. at 411-412. Such an expansive reading of federal criminal law would, of course, cast upon the overworked federal courts the burden of deciding many criminal cases that should properly be left to local prosecutors and courts. Yet the decision in this case does exactly what was warned against in *Rewis*—it "would transform relatively minor state offenses into federal felonies" (401 U.S. at 812) without an explicit Congressional expression of intention to do so and in the face of Congressional language in other statutes which indicates that this was not Congress' desire.

We note at the outset that there can be no doubt that this case does not involve a "gambling offense" in any ordinary sense of the term. The defendants were not operating a gambling enterprise in a jurisdiction where gambling is forbidden. Nor—as was true in *United States* v. *Roselli,* 432 F.2d 879 (9th Cir. 1970), *cert. denied,* 401 U.S. 924 (1971)—were they engaged in a fraudulent enterprise of the kind specifically prohibited by a local law directed at deceptive gambling such as card playing or betting. In every respect relating to the *gambling* aspect of their business, the defendants acted in full compliance with local regulations.

The local violation they are charged with having committed, that assertedly converted the operation of VFI into a "gambling offense," was that they failed "to disclose the identities of Zerilli and Polizzi as persons having an interest in VFI" when the VFI license applications were filed. App. A, p. 9a. This, we submit, was simply not a "gambling offense" within Congress' intended meaning in the Travel Act, even if it fell short of the requirement of Nev. Rev. Stat. § 463.200 that "all persons directly or indirectly interested" in a corporate licensee be disclosed, and even if the very debatable assumption made by the court below—*i.e.*, that there was a failure to make the disclosure directed by the statute—amounted to a "violation" punishable by Nev. Rev. Stat. § 463.360 ("the catchall section") as a "gross misdemeanor."

Nondisclosure or false statements in a licensing regulation are separate and distinct acts from the nature of the business for which a license is sought. Such nondisclosure or falsity does not become a "gambling offense" simply because the license is sought for a gambling business. If, by way of analogy, a Nevada statute required gambling casinos to have three fire exits, would it be a "gambling offense" to operate a casino with one? Or if Nevada law required that employees of gambling casinos work not more than nine hours a day, would it be a "gambling offense"—reachable by the federal Travel Act—to operate a casino where the employees worked on twelve-hour shifts?

Congress' intention when the law was enacted is clear from the legislative history examined by this Court in *Rewis* and in its earlier decision in *United States* v. *Nardello*, 393 U.S. 286 (1969). Congress

authorized federal prosecution of those who operated "unlawful businesses"; the law was not designed, as the Assistant Attorney General who testified in support of it observed, to bring within federal jurisdiction "incidental illegal acts done in the course of lawful businesses." *Legislation Relating to Organized Crime*, Hearings on H.R. 468 etc. before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess., 336 (1961). At best, the failure to disclose the interest of Zerilli and Polizzi amounted to "incidental illegal acts" which did not convert the operation of a lawful casino in Nevada into "an unlawful business enterprise." See the testimony of Attorney General Kennedy, *id.* at 35.[8]

Besides conflicting with principles established by decisions of this Court, the ruling of the Court of Appeals conflicts with the view of the Travel Act recently taken by the Court of Appeals for the Second Circuit in *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973), where the Solicitor General did not seek review of a reversal of a major conviction. Judge

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[8] Assistant Attorney General Miller said in the course of the House hearings (*op. cit.* at 342): "When we defined business enterprise as one involving gambling, liquor violation, and the like, we were thinking of the business itself as being an illegal business. Any business enterprise can have an employee or the president or someone down the line commit some act which is a violation of a statute and therefore, a crime. * * * Now, that does not make the business enterprise, itself, an unlawful one. It merely means that one individual has committed a crime, and it has no relation to the business enterprise itself." Mr. Miller also expressed the same view in a law review article he wrote shortly after the enactment of the law. Miller, *The "Travel Act": A New Statutory Approach to Organized Crime in the United States*, 1 Duquesne U.L. Rev. 181, 194 (1963) ("A program to establish a gambling casino in Las Vegas, Nevada, would not amount to 'unlawful activity' ").

Friendly, speaking for the Second Circuit, observed in *Archer* that "[t]oday there is widespread concern whether the federal criminal law has not outrun reasonable bounds." 486 F.2d at 677. He quoted an authoritative statement that "[t]here is practically no offense within the purview of local laws that does not become a Federal crime if some distinctive Federal involvement happens to be present." *Id.* at 678. On the basis of these considerations, among others, the Travel Act was read narrowly in *Archer* so as not to apply to the facts of that case.

This case graphically demonstrates how the limitations inherent in the Travel Act's objectives—even if not in its language—may be abused. An alleged nondisclosure, which is not even a clear ground for civil revocation of a license under Nevada law and which amounts, at most, to a "gross misdemeanor" under the most prosecutorial reading of the Nevada statute, is made the basis of an assertion that the entire licensed operation of a gambling casino is "in violation of the laws" of Nevada, so that any assistance to that operation is punishable as a federal felony with heavy fines, jail terms of three and four years, and the collateral consequences of a felony conviction.

There is, moreover, more than the legislative history of the Travel Act itself that proves Congress' narrow focus. Other federal criminal statutes reach "illegal gambling businesses," and in each instance the law would be extended well beyond Congress' probable intention if it were read to cover incidental or peripheral illegality of the kind sought to be proved here. Thus, 18 U.S.C. § 1955 covers any gambling business "which is a violation of the law of a State"; this would have a sweeping effect, for example, on any gambling

enterprise in Nevada that could be shown to be in violation of some local regulation. Yet in *United States* v. *Gordon*, 464 F.2d 357 (9th Cir. 1972), the Court of Appeals, relying on *United States* v. *Bass*, *supra*, held that a violation of the Nevada Gambling Commission regulations which leads only to civil sanctions does not qualify under § 1955.[9]

The decision below is, therefore, a signal departure from established federal-state relations under which local crimes, with the exception of thoroughly illegal businesses that are owned and operated from out of state, are subject to local police control. If the Nevada authorities were misled enough by the alleged failure to disclose the names of Zerilli and Polizzi as interest-holders in VFI, they could have initiated license-revocation proceedings or sought to prosecute those responsible for a "gross misdemeanor." This Court should not, at a time when the dockets of federal courts are swollen, approve of a precedent which will drag into the federal courts a host of other similar felony charges based upon minor incidental infractions of local law.

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[9] Similarly, 18 U.S.C. §§ 1961-63 subjects to certain federal criminal sanctions "any act or threat involving * * * gambling * * * which is chargeable under State law and punishable by imprisonment for more than one year." If "gambling" were read in that law as sweepingly as it has been read by the court below, incidental illegal acts associated with legal gambling enterprises would be the subject of federal court action. See also 18 U.S.C. § 1511 (6)(1).

II. The Court of Appeals, in Direct Conflict with Other Circuits, Erroneously Held that Conspiracy To Violate the Travel Act Does Not Require Specific Intent To Violate State Law.

The broad reading of the Travel Act adopted below is particularly unfair when it is applied in a way that does not require the prosecution to establish specific knowledge that local law has been violated. That is precisely what occurred here.

The Court of Appeals itself recognized (App. A at 19a) that its decision in regard to the nature and extent of specific intent required to prove a violation of the Travel Act was in conflict with that set forth in *United States* v. *Stagman*, 446 F.2d 489, 492-493 (6th Cir. 1971).

As pointed out by the court below (App. A at 19a n. 29), the jury in this case was instructed that "it is not necessary that the Government prove that the defendants knew that they were violating Nevada law. The specific intent which the Government must show is the intent to facilitate the carrying on of a business enterprise involving gambling in violation of Nevada law." The court thought these instructions "could have been more precise" (*id.* at 19a) but nevertheless upheld them because it disagreed with *Stagman* that specific intent to violate state law was a necessary prerequisite to conviction (see App. A at 19a modified by the denial of the Petition for Rehearing, App. B at 95a).

Stagman, on the other hand, cited cases by four different Courts of Appeals holding or stating that "knowing and willful intent to violate state laws is an element of the crime proscribed by the Travel Act."

446 F.2d at 491-492.[10] The court noted the Government's argument (adopted by the court below in the instant case) that "the word 'intent' is meant to apply only to the verb 'to carry on' and not to its object, 'unlawful activity'—*i.e.*, that the crime does not require knowledge that the activity is unlawful." *Id.* at 492. But the Sixth Circuit in *Stagman* rejected that argument, saying, "We prefer the more natural reading, in which 'intent' refers to the entire phrase 'to * * * carry on * * * any unlawful activity,' " citing "the purposes and structure of the Act" to support its interpretation. *Id.*

This conflict must be resolved. It will not go away. Courts continue to convict under the Travel Act and to instruct juries, either on the necessity of a specific intent to violate state law or on the non-necessity of such an intent. Unless this Court acts, the confusion and conflict will abound.[11]

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[10] *United States* v. *Miller*, 379 F.2d 483, 486 (7th Cir. 1967); *Turf Center, Inc.* v. *United States*, 325 F.2d 793, 797 (9th Cir. 1963); *United States* v. *Hanon*, 428 F.2d 101, 108 (8th Cir. 1970) (en banc) citing *Miller* with approval).

The court also cited two cases holding to the contrary. *United States* v. *Hawthorne*, 356 F.2d 740, 742 (4th Cir. 1966), and *United States* v. *Wechsler*, 392 F.2d 344, 347 (4th Cir. 1968).

[11] The Court has granted a petition for writ of certiorari on a similar issue of specific intent for a federal conspiracy conviction. In *United States* v. *Alsondo*, 486 F.2d 1339 (2d Cir. 1973), *cert. granted, sub nom. United States* v. *Feola*, No. 73-1123, 42 U.S. L.W. 3584, the Second Circuit held that although proof of a jurisdictional element was not requisite for conviction of a substantive offense under 18 U.S.C. § 111, *conspiracy* to commit that same offense required proof that the defendants knew the official identity of the federal officer they were charged with assaulting. Similarly, in the present case it is submitted that in order to be convicted of conspiracy to violate the Travel Act, the Government must *inter alia* prove intent to violate state law whether or not that intent is requisite to a substantive offense under the Act.

III. The Court of Appeals, In Direct Conflict With the Sixth Circuit, Erroneously Held One Corporation Criminally Liable for the Acts of Another.

In Section XVI of its opinion (App. A, pp. 79a *et seq.*), the court below applied a startling new principle of vicarious criminal liability which is not supported by any decision of this Court and which conflicts squarely with the decision of the Court of Appeals for the Sixth Circuit in *United States v. Carter*, 311 F.2d 934, 941, *cert. denied*, 373 U.S. 917 (1963). The court below has held in this case that a parent corporation, which was not shown to have had any involvement whatever with alleged criminal acts when they were committed, could be held criminally liable for the acts of a subsidiary corporation solely because the subsidiary was, for reasons totally unrelated to the alleged crime, merged into the parent four years after the commission of the offense.

In *Carter*, as in this case, the parent (City Products Corporation) acquired by merger the assets of its subsidiary (Pilsener Brewing Company) after the alleged criminal conduct and prior to the bringing of federal charges. Both entities were convicted, but the Sixth Circuit held on appeal that the merger "would not make [City Products] chargeable, as a principal, for a crime previously committed by Pilsener. * * *" 311 F.2d at 941. *Carter* is directly contrary to the Ninth Circuit's holding in this case. In the instant appeal, both sides extensively briefed the Sixth Circuit decision, but the court below simply ignored it. The conflict requires resolution here.

This Court recently considered the civil liabilities of a purchasing corporation which had bought a business *with knowledge* that the preceding owner had

engaged in an unfair labor practice. It concluded, in *Golden State Bottling Co.* v. *NLRB,* 414 U.S. 168 (1973), that in order to effectuate the remedial purposes of the National Labor Relations Act, a bona fide successor may be liable for reinstatement and back pay to improperly discharged employees. The Court reasoned that "[s]ince the successor must have notice before liability can be imposed, 'his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practice.'" *Id.* at 185. In the instant case, on the other hand, adjustments in price and indemnification agreements are obviously inadequate and unavailable to provide for possible criminal prosecutions. And, on the record of this case, it is clear that even the issue of knowledge was taken from the jury by the judge's instruction (pp. 8-9, *supra*), which simply told the jurors that if the original offender committed a violation, the merged parent was to be found guilty.

The starting point with regard to the survival of corporate criminal liability is, as this Court observed in *Melrose Distillers, Inc.* v. *United States,* 359 U.S. 271, 272 (1959), that "in the federal domain prosecutions abate both on the death of an individual defendant * * * and on the dissolution of a corporate defendant * * * unless the action is saved by statute." In the *Melrose Distillers* case this Court concluded that corporations which were dissolved when their businesses became divisions of a parent corporation could still be prosecuted criminally under the Sherman Act even after dissolution. Application of the *Melrose Distillers*

principle would have required that the present action be taken only against the original Emprise Corporation.

Indeed, it was clear throughout the proceedings below that, notwithstanding the transfer of assets and dissolution by merger, the original corporation was available for criminal prosecution. The dismissal of the initial charge—the appeal from which was abandoned by the government—was based entirely on the conclusion that the case was in the wrong federal district. Moreover, in District Judge Weinfeld's decision in *United States* v. *Cigarette Merchandisers Ass'n*, 136 F.Supp. 214 (S.D.N.Y. 1955), on which the court below relied for its understanding of New York law (App. A, pp. 82a, 83a), the court ruled that the acquired corporation, which had been dissolved by merger, could be prosecuted "for crimes it may have committed prior to dissolution." 136 F.Supp. at 217. Accord: *United States* v. *Stone*, 452 F.2d 42, 47 (8th Cir. 1971) (construing the present New York statute). Here, instead of prosecuting the dissolved corporation —as required by the federal policy of *Melrose Distillers* and the law of New York—the government has attached criminal liability to the purchaser of its assets solely because that purchaser is, *for civil purposes*, responsible under New York law for the dissolved corporation's liabilities.

The court below also erred, we submit, in placing such heavy reliance on local law in the application of a federal criminal statute. Corporations which operate in several states should not have their federal criminal liability turn on the vagaries of laws of particular local jurisdictions. Such a rule is not only

burdensome to federal prosecutors and courts, which must administer the law, but unfair to putative defendants, particularly those whose business takes them into various states.

The decision below, if allowed to stand, has serious implications for American business. It subjects the surviving corporation in a merger to vicarious criminal liability for acts performed on behalf of an acquired corporation on some earlier date.[12] Banks and insurance companies could be fatally disabled by criminal convictions for acts they neither committed nor knew of, but which had been undertaken on behalf of businesses they purchased. Mergers and consolidations are commonly used methods of achieving permissible business objectives, and businessmen anticipate that when they engage in such transactions the survivor or new corporation will bear the risk of unknown *civil* liabilities. The price and terms of the exchange will reflect that risk, and familiar techniques of contract law are available to shift the economic burden where it equitably belongs. But we conceive of no way by which the possibility of vicarious criminal liability and

[12] The court below placed no reliance whatever on the fact that the petitioner and the dissolved corporation had a parent-subsidiary relationship, so that the court's reasoning applies to corporations which are total strangers prior to merger. In any event, in the absence of proof (and a jury finding) that the parent corporation was itself involved and knew of the illegal activity, the parent cannot be held criminally liable. With corporations, as with individuals, a master is not liable for the criminal acts of his servants unless he authorizes or knows and acquiesces in what the servant has done. Sayre, *Criminal Responsibility for the Acts of Another*, 43 Harv. L. Rev. 689, 723 (1930). No proof of authorization, knowledge, or acquiescence by High Park was offered in this case and, under the instruction given the jury (pp. 8-9, *supra*), no such issue was relevant.

its collateral consequences can be covered by contract. The parties can, of course, provide for the costs of defense of a criminal prosecution against the dissolved corporation and the payment by the survivor of any fine that is due. If, however, the survivor may be held vicariously liable and be treated itself as a felon, the potential harm—particularly in licensed industries—is so staggering that corporations would be encouraged to forego both external and internal mergers and acquisitions. If such a result is to be reached, it surely requires more careful legal and economic consideration than was given by the court below.

Vicarious criminal liability is "repugnant to every instinct of the criminal jurist," *Sayre, supra*, 43 Harv. L. Rev. at 702. It is no less so when it attaches to a corporation rather than an individual. In the context of this case, the question of vicarious liability presents important issues affecting corporate business in general and the economy of the nation. The fundamental problems of criminal jurisprudence raised by the decision below should not be obscured by the other issues discussed in the court's lengthy opinion or by the size of the record. They deserve isolated and thorough examination from this Court.

IV. The Court of Appeals Erroneously Refused To Recognize the Unconstitutionality of Acts Which, Both Singly and in Sum Total, Denied Petitioner's Fifth and Sixth Amendment Rights.

We respectfully submit that petitioner was denied due process in violation of the Fifth Amendment and a jury trial in violation of the Sixth Amendment by the conduct of the prosecution prior and subsequent to trial and by the conduct of the prosecutor and the court at trial. Petitioner was so repeatedly prejudiced by

this conduct that it was denied even the semblance of a fair hearing and a fair decision by the jury.

We recognize, of course, that a long and complex trial cannot be a perfect trial, that some mistakes are bound to be made, and that appellate courts have latitude in overlooking minor errors. But there is another side to that coin: the length and complexity of a trial should not be used as an excuse for, or as a shield against, the denial of basic constitutional rights. This is particularly true here, where there are not one or two isolated violations of limited magnitude, but rather an entire range of serious and pervasive violations going to the very core of constitutional due process.

In presenting these, we do not rely upon our own interpretation of the record, which is far more serious than that put forth by the Court of Appeals. Rather, for purposes of this Petition, and in order that the Court will have no question about what occurred, we adopt the Court of Appeals' own version of events, with appropriate references to that Court's opinion in Appendix A:

—The government illegally wiretapped three defendants over a three-year period (84a-85a). Thereafter, the prosecutor threatened to use the logs of the illegal tapes if a defense attorney did not drop a line of redirect examination, which the attorney did (86a-88a); and a reporter read the prosecutor's transcript of a benchside conference about the logs, and his paper headlined, "Transcript Shows U.S. Bugged Vegas Defendants' Mafia Talks" (88a-89a).[13]

[13] Prior to trial, when requests were made for disclosure of eavesdropping by the prosecution, totally inadequate steps were taken to determine who was overheard, and it is not known to this day,

—The trial court allowed jurors, who were not sequestered, to read newspapers with the admonition that they avoid stories on the trial—which presumably meant reading headlines to determine which stories did and did not involve the trial (27a-28a). The newspapers carried stories, *inter alia*, "linking [two defendants] to James Hoffa" (29a), "referring to [defendants] and their links to organized crime" (30a), and disclosing a sidebar conference at which the Mafia was discussed (23a-24a, 30a).[14] "The motion picture *The Godfather* was released during the trial, and a local television personality discussed during his program the book and [two defendants] and their alleged links to the Mafia" (23a). The "Mafia" and "related terms" were actually talked about by the jurors at the beginning of their deliberations (31a-34a). Defense counsel "told the [trial] court of juror Palmer's revelation that other jurors had been reading newspaper stories about the case and that it had been 'devastating to the defendants'" (34a-35a). The trial court refused to investigate, although the juror was then in the courtroom.[15]

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with sufficient certainty, whether officers of the petitioner were not themselves targets or victims of illegal eavesdropping.

For a fuller exposition of this eavesdropping, see the Petitions for Writs of Certiorari filed contemporaneously with this Petition by the other defendants convicted below.

[14] *Cf. Mares* v. *United States*, 383 F.2d 805, 809 (10th Cir. 1967): "If any juror even saw the headline and connected it with the trial in progress, the possibility that it would not prejudice that juror is so slight that it merits no consideration."

[15] See *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Estes* v. *Texas*, 381 U.S. 532, 543 (1965); *Chapman* v. *California*, 386 U.S. 18, 43-44 (1967).

The failure to make a prompt investigation of such a charge and to recognize the harmful effect of such jury exposure was held reversible error in *United States* v. *Thomas*, 463 F.2d 1061, 1065 (7th Cir. 1972).

—The prosecutor told the jury that defendants "have learned it is better to use a corporate resolution than a pistol," and "have learned that a corporate resolution is more deadly and more effective than a pistol * * *" (43a n. 56). He also stated that defendants' conduct was "the good old fashioned Chicago type extortion" (45a n. 60).[16] Even the Court of Appeals conceded that "In his closing arguments, the prosecutor did make comments which could have conveyed the impression that appellants were violent individuals" (45a).

—The trial court on two separate occasions prior to verdict conducted interrogations of jury members without defendants or their counsel being present (29a, 31a).[17]

—"On four occasions, in ruling on questions addressed to two government witnesses, the trial judge made comments that appear[ed] to vouch for the credibility of the [government's] witnesses" (46a), and he also indicated in front of the jury that one of the defendants could cure another witness' testimony by taking the stand (47a n. 63).

—Three times the prosecutor improperly used a deposition from another proceeding, without order of court or notice, to challenge witnesses in this case (49a-50a).

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[16] See *Bruton* v. *United States*, 391 U.S. 123 (1968); *Berger* v. *United States*, 295 U.S. 78 (1935); American Bar Association Standards Relating to the Prosecution Function, Approved Draft, Sec. 3.5, 5, pp. 87(b), 88 (February 1971).

[17] See *Lewis* v. *United States*, 146 U.S. 370, 372 (1892); *United States* v. *Palladino*, 475 F.2d 65, 75 (1st Cir. 1973); *United States* v. *McCoy*, 429 F.2d 739, 742 (D.C. Cir. 1970).

—The prosecutor, despite the Jencks Act, failed to disclose prior to trial the transcript of a taped conversation between the key government witness and another person (52a-54a).[18]

—The prosecutor disclosed only a promise to the government's key witness to call his testimony to the attention of his Parole Board. However, the witness' former custodian swore that the witness had told him of a government promise to release him after testifying —and he was in fact so released (58a-60a).[19]

—After being instructed that certain prior conduct by defendants was not to be inquired into, the prosecutor nevertheless cross-examined on precisely that conduct (48a-49a).

—The prosecutor was allowed to elicit from a witness the testimony that in a taped transcript, the witness had told him two defendants had certain hidden interests—which in fact the witness had not stated in the transcript (54a-58a).[20]

—The prosecutor argued "skimming" to the jury even though there was no evidence in the case of such a practice (22a).

—The trial court refused to give an instruction on the testimony of a perjurer even though a Government witness had previously been convicted of perjury (21a-22a).

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[18] See *Campbell* v. *United States*, 373 U.S. 487 (1963).

[19] See *Giglio* v. *United States*, 405 U.S. 150 (1972).

[20] See *Mooney* v. *Holohan*, 294 U.S. 103 (1935); *United States* v. *Ryan*, 455 F.2d 728, 732 (9th Cir. 1972).

The Court of Appeals concedes[21] not only that these occurrences took place, but that in many instances "errors" occurred.[21] It attempted, however, to explain away, play down or overlook the seriousness of each "error." We submit not only that many of these "errors" rose to the level of individual constitu-

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[21] "* * * [I]t was error to permit the government to begin a line of questioning with a high possibility of prejudice * * *" (44a); "Even if the giving of the suppression of evidence instruction were error * * *" (21a); "We agree with appellants that it would have been preferable to ask each juror about the newspaper * * *" (29a-30a); "On four occasions, in ruling on questions addressed to two government witnesses, the trial judge made comments that appear to vouch for the credibility of the witnesses" (46a); "Upon hindsight, there were things said by the prosecution which would have been better unsaid" (51a); "although the trial court clearly had the best of motivations * * *, it did commit error" (55a); "The government concedes that the electronic surveillance was conducted illegally" (84a); "It is true that many of the Los Angeles witnesses on the government's first list disappeared from the second list * * *" (67a); "Whatever prejudice to appellants could have resulted * * *" (22a); "In this case the problem of publicity was not insignificant * * *" (39a); "In his closing arguments, the prosecutor did make comments which could have conveyed the impression that appellants were violent individuals" (45a); "However, the probative value of that testimony was not great enough to justify its admission * * *" (49a); "The use of the deposition cannot be justified by [Fed. R. Crim. P.] 15 * * *" (49a); "* * * even if undisclosed promises had been made * * *" (59a); "although the instructions on specific intent, viewed alone, could have been more precise * * *" (19a); "Though the court's rulings were erroneous * * *" (44a); "If it were error to allow the prosecution to ask appellant Rooks about the first Reisman deposition * * *" (50a); "While it may generally be preferable for the trial court to allow such an examination of jurors * * *" (35a-36a); "* * * a question of inconsistency perhaps did arise * * *" (53a); "The balance may not have been so clear when Giordano moved for severance during trial" (69a); "The court thus should not have admitted any testimony referring to the Lands transcript" (55a); "At most the witness may have misunderstood the court * * *" (55a); "Errors were committed * * *" (51a).

tional violations, but that *in sum* they clearly and without question denied petitioner the fair trial to which it was entitled under the Fifth and Sixth Amendments.

In addition, there was one serious constitutional violation that is not sufficiently reflected in the Court of Appeals opinion. The record of the proceedings below establishes beyond doubt that there was prominently presented to the jury a theory for petitioner's violation of the Travel Act which the Court of Appeals held invalid. The government charged in the indictment and in the information and urged in closing argument (39 R.T. 7902-94, 43 R.T. 8693-95) that the defendants violated the law because holders of alleged hidden interests in the gambling franchise *were not themselves licensed.* And the trial court struck from petitioner's requested instructions a statement that in gambling conducted by a corporation, only the corporation need be licensed. It allowed to stand a statement that *patrons* going to the casino to gamble need not be licensed, strongly suggesting the negative pregnant that other interested parties would have been required to hold a license. The Court of Appeals clearly and emphatically rejected precisely this required-licensing theory. As the court's opinion put it, speaking of the government's contention that all persons with a direct or indirect interest in a gambling casino must be licensed: "We find no such requirement in Nevada law." App. A, p. 11a.

The decision of the Court of Appeals, invalidating the theory of Travel Act violation relied upon by the government and yet affirming convictions undoubtedly returned on precisely the same theory, has ignored the clear teaching of a long line of cases in this Court. *E.g., Clay* v. *United States,* 403 U.S. 698, 705 (1971);

Rewis v. *United States, supra; Bachellar* v. *Maryland*, 397 U.S. 564, 570-571 (1970); *Yates* v. *United States*, 354 U.S. 298, 312 (1957); *Stromberg* v. *California*, 283 U.S. 359, 367-368 (1931).

CONCLUSION

For each and all of these reasons, we respectfully submit that the Petition for a Writ of Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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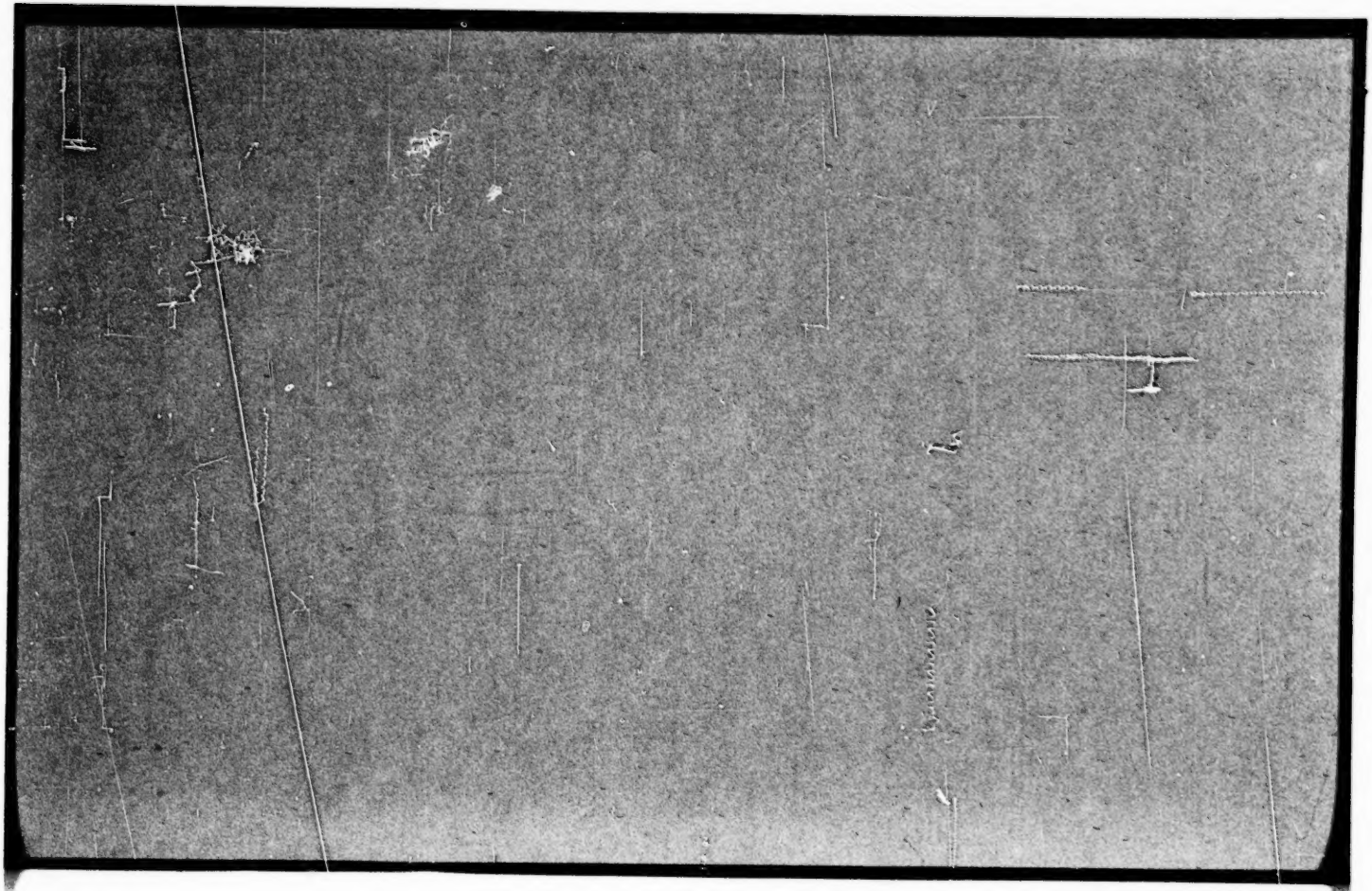

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-283

EMPIRE CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

Page

Appendix A. Opinion of Court of Appeals, April 30, 1974 ..... 1a

Appendix B. Denial of Petition for Rehearing, July 18, 1974 ..... 94a

Appendix C. Order Correcting Date of Filing of Order Denying Petitions for Rehearing, August 5, 1974.. 98a

Appendix D. Stay of Mandate, August 12, 1974 .....100a

Appendix E. Order Extending Time To File Petition for Writ of Certiorari, August 8, 1974 ..... 102a

Appendix F. Constitutional and Statutory Provisions 103a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-2983
UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
v.
MICHAEL SANTO POLIZZI, *Defendant-Appellant.*

No. 72-2984
UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
v.
JACK S. SHAPIRO, *Defendant-Appellant.*

No. 72-2985
UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
v.
PETER JAMES BELLANCA, *Defendant-Appellant.*

No. 72-2986
UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
v.
ANTHONY GIARDANO, *Defendant-Appellant.*

No. 72-2987
UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
v.
ARTHUR J. ROOKS, *Defendant-Appellant.*

No. 72-2988
UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
v.
ANTHONY JOSEPH ZERILLI, *Defendant-Appellant.*

No. 72-2989
UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
v.
EMPRISE CORPORATION, a New York Corporation,
Defendant-Appelant.

Opinion

April 30, 1974

Appeal from the United States District Court
for the Central District of California

Before: BROWNING and DUNIWAY, Circuit Judges, and RENFREW,* District Judge.

RENFREW, District Judge:

In 1966 and 1967, appellants Zerilli and Polizzi acquired hidden interests in Vegas Frontier, Inc. (VFI); a Nevada corporation, which leased and operated the Frontier Hotel in Las Vegas, Nevada. VFI was also licensed to conduct gambling at the hotel, which opened in July of 1967. Neither Zerilli nor Polizzi was licensed by the Nevada gaming authorities, nor was either man's interest in VFI disclosed to those authorites. After extensive negotiations, VFI was sold in November, 1967, to Howard Hughes.

Following a very lengthy and complex trial,[1] Zerilli, Polizzi, and the other appellants were convicted of conspiracy (18 U.S.C. § 371) to violate 18 U.S.C. § 1952[2]

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* The Honorable Charles B. Renfrew, United States District Judge, Northern District of California, sitting by designation.

[1] There were 48 days of trial reported in 11,022 pages of reporter's transcript (including post-trial motions), and 321 exhibits were received in evidence.

[2] 18 U.S.C. § 1952 provides in part:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not

(Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises) and of substantive violations of that section. Appellants challenge their convictions on a number of bases. They contend:

1. That the prosecution failed to show a violation of § 1952.

2. That, if a violation were shown, the laws in question would be unconstitutionally vague.

3. That the court erred in instructing the jury.

4. That the publicity surrounding their trial deprived them of a fair trial and that there was jury misconduct which the court refused to investigate.

5. That the label "Mafia" was applied to them in a public list of Mafia figures made by the Department of Justice and that the list was submitted in the grand jury proceedings and in the trial in this case and that these actions constitute a deprivation of their rights of due process.

6. That the trial court committed error in the permission it gave to the prosecution to cross-examine certain of the appellants about their reputations as members of the Mafia when the appellants had not presented evidence of character or reputation.

7. That they were deprived of a fair trial by misconduct of the prosecutor which the trial court sanctioned.

8. That the testimony of a key prosecution witness should have been stricken in that the prosecution's untimely

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more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section, 'unlawful activity' means (1) any business enterprise involving gambling * * * offenses in violation of the laws of the State in which they are committed or of the United States * * *."

production of his pretrial statements violated the Jencks Act.

9. That error was committed in the admission of the testimony of that witness on the grounds that part of the testimony was conclusively demonstrated to be false, and admitted to be false by the witness.

10. That promises of leniency made to the witness by the prosecution were not disclosed.

11. That the acts complained of were a unitary crime and that it was not proper for them to be convicted of a conspiracy and substantive violations based upon the same conduct.

12. That the venue of the trial court was improper.

13. That the court below erred in refusing to grant appellant Giordano's motion for severance.

14. That the court below erred in failing to instruct the jury that evidence admitted after appellant Giordano had rested at the close of the prosecution's case could not be considered against him.

15. That appellant Giordano's motion for acquittal at the close of the prosecution's case should have been granted.

16. That appellant Emprise is not liable for any criminal acts that its predecessor in interest allegedly committed.

17. That the evidence was insufficient to support their convictions.

18. That the trial was materially tainted by leads from unlawful electronic surveillance.

Having carefully considered each of these contentions, we affirm the convictions below. Although this opinion is longer than we would have preferred, appellants have raised and argued so many points in 534 pages of briefs, exclusive of appendices and exhibits, that we find a lengthy opinion unavoidable.

I. *Violation of § 1952*

Appellants' threshold contention is that their conduct did not come within the coverage of the federal Travel Act (18 U.S.C. § 1952), raising two issues as to the meaning of the statute. Section 1952 condemns interstate travel or the use of interstate facilities in the furtherance of "any unlawful activity," defined as including "any business enterprise involving gambling * * * offenses in violation of the laws of the State in which they are committed or of the United States * * * ." A violation of § 1952 thus must be premised upon another distinct violation of state or federal law.

Although state law becomes the focus of this inquiry, "the gravamen of a charge under § 1952 is the violation of federal law * * * ." *United States* v. *Karigiannis*, 430 F.2d 148, 150 (7 Cir. 1970) (Clark J.), *cert. denied* 400 U.S. 904 (1970). "Reference to state law is necessary only to identify the type of unlawful activity in which the defendants intended to engage." *United States of America* v. *Rizzo*, 418 F.2d 71, 74 (7 Cir. 1969), *cert. denied* 397 U.S. 967 (1970).

While the Government's theory was not succinctly stated, either in its briefs or at oral argument, it does emerge from a careful reading of the indictment and information[3] together with the court's instructions to the jury[4] that ap-

[3] The indictment names the six individual appellants and the information names appellant Emprise Corporation, the successor in interest to a merged corporation of the same name which had been dismissed from the indictment for lack of personal jurisdiction prior to trial.

[4] Both the information and indictment contain the following language charging appellants with traveling "in interstate commerce and [using] facilities in interstate commerce with intent to:

"1. Distribute the proceeds of unlawful activity, namely: the ownership, operation of, and receipt of profits from a Las Vegas, Nevada gaming casino by persons who were not licensed and whose

pellants violated the federal Travel Act by conduct which was a "business enterprise" that involved "gambling * * * offenses" in violation of Nevada Revised Statutes (N.R.S. § 463.160[5] in that Zerilli and Polizzi's interests in the gambling conducted by VFI at the Frontier Hotel were hidden from the Nevada gaming authorities.

---

interest in the gaming casino had been concealed from agencies of the State of Nevada in violation of Nevada law; and

"2. Promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of unlawful activity, namely: the ownership, operation of, and receipt of profits from a Las Vegas, Nevada gaming casino by persons who were not licensed by and whose interest in the gaming casino had been concealed from agencies of the State of Nevada in violation of Nevada law * * *."

The court's instructions to the jury were also couched in terms of the failure to disclose the interest of Zerilli and Polizzi in VFI.

[5] Nevada Revised Statutes (N.R.S.) § 463.160 lays down the basic law requiring a license for gambling operations:

"1. It is unlawful for any person, either as owner, lessee or employee, whether for hire or not, either solely or in conjunction with others:

"(a) To deal, operate, carry on, conduct, maintain or expose for play in the State of Nevada any game or slot machine as defined in this chapter, or to operate, carry on, conduct or maintain any horserace book or sports pool; or

* * * * *

"(c) To receive, directly or indirectly, any compensation or reward or any percentage or share of the money or property played, for keeping, running, carrying on or permitting the same to be carried on, without having first procured, and thereafter maintaining in full force and effect, all federal, state, county and municipal gaming licenses as required by statute or ordinance * * *."

N.R.S. § 463.170 then indicates what information must be disclosed if a license is to be obtained by a corporation:

"2. No corporation * * * shall be eligible to receive or hold any license under this chapter unless all persons having any direct or indirect interest therein of any nature whatsoever, whether finan-

Appellants' first argument is that since VFI had a gambling license as required by Nevada law, their activity could not be unlawful within the meaning of the federal Travel Act. They rely considerably on one instruction, to which the government did not object, that VFI was licensed and that the gambling it conducted could not be found illegal.[6] Appellants counsel stated at oral argument that, even if appellants procured the VFI license fraudulently, there would be no criminal violation of Nevada law. We disagree.

This instruction meant only that the trial court did not believe that the prosecution could rely upon N.R.S. § 463.160(1)(a). The license would not be viewed as void *ab initio*, and the appellants could not be prosecuted for conducting a gambling enterprise without a license. Nor could the prosecutor "pierce the corporate veil" to reach appellants.[7] The instruction does not, however, legitimize

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cial, administrative, policymaking or supervisory, are individually qualified to be licensed under the provisions of this chapter."

[Appellants contend that the revised N.R.S. § 463.170(2), effective July 1, 1967, should have been applied. In footnote 11, *infra*, we point out the error in that contention.]

The statute governing the disclosure to be made in an application for a license provides:

"2. The application shall include:

* * * * *

"(d) The names of all persons directly or indirectly interested in the business and the nature of such interest." N.R.S. § 463.200.

The forms supplied for an application by a corporation indicate that corporate officers and stockholders are to be listed as those persons interested in the business.

[6] "Since in this case a license was issued to the corporation VFI, any gambling conducted by or through VFI would not be illegal and would not be in violation of this statute [N.R.S. § 463.160]." Reporter's Transcript, Vol. 43, p. 8798.

[7] See footnote 13, *infra*.

all the acts of appellants in obtaining the license. N.R.S. § 463.160(1)(c) covers precisely the charges here against appellants: receiving compensation from gambling conducted without having procured and maintained licenses as required by law.[8]

Appellants argue, however, that N.R.S. § 463.160(1)(c) only requires that the gambling be licensed and does not reach fraud or other violations in obtaining the license. Acceptance of this construction of Nevada law would effectively emasculate the statutory scheme of requiring the disclosure of the identities of the persons who would be involved in the gambling enterprise. This disclosure requirement has as its purpose the prevention of the infiltration of criminal elements into gambling in Nevada.[9] Section 463.160(1)(c) requires not only that a license be

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[8] See footnote 5, *supra*, for the language of the statute.

[9] "It is hereby declared to be the policy of this state that all establishments where gambling games are conducted or operated or where gambling devices are operated in the State of Nevada shall be licensed and controlled so as to better protect the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada." N.R.S. § 463.130(1).

The Nevada Supreme Court, in a decision handed down two years prior to the enactment of the statutes here in question, gave a strong policy basis for the licensing requirement:

"Nevada gambling, if it is to succeed as a lawful enterprise, must be free from the criminal and corruptive taint acquired by gambling beyond our borders. If this is to be accomplished not only must the operation of gambling be carefully controlled, but the character and background of those who would engage in gambling in this state must be carefully scrutinized.

"* * * The risks to which the public is subjected by the legalizing of this otherwise unlawful activity are met solely by the manner in which licensing and control are carried out." *Nevada Tax Commission* v. *Hicks*, 73 Nev. 115, 119-120, 310 P.2d 852, 854 (1957). See also *Berman* v. *Riverside Casino Corporation*, 247 F. Supp. 243, 250 (D. Nev. 1964), *aff'd*, 354 F.2d 43 (9 Cir. 1965).

This statement of policy was not qualified but rather reaffirmed by N.R.S. § 463.130(1), *supra*.

procured and maintained, but also that it must be procured and maintained in a manner that satisfies the other provisions of the gambling law. The term "as required by statute" must be viewed in light of the strong state policy behind the statutes. The interpretation offered by appellants would give free rein to criminal elements in their attempts to infiltrate Nevada gambling. The most they would risk would be the administrative revocation of their corporation's license. They would become criminally liable only if they operated a gambling enterprise without procuring a license, and the most dangerous elements could easily avoid such a blatant violation of Nevada law. Given these considerations, the only reasonable construction of N.R.S. § 463.160(1)(c) is that persons receiving compensation from the gambling operation must fulfill all other state requirements surrounding the granting of a license.[10]

Appellants violated those other provisions by failing to disclose the identities of Zerilli and Polizzi as persons having an interest in VFI. Under N.R.S. § 463.170(2), applicants for a corporate license had to disclose "persons having any direct or indirect interest therein of any nature whatsoever, whether financial, administrative, policy-making or supervisory * * *."[11] The disclosure require-

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[10] *See Huddleston* v. *United States*, —— U.S. ——, —— (1974); *Cf. Rewis* v. *United States*, 401 U.S. 808, 811-812 (1971).

[11] Appellants have contended in their briefs that the revision of this section effective July 1, 1967, should be applied. They did not press this point at oral argument. We find their contention untenable. Although VFI's license was not issued until July 5, 1967, to be effective July 27, 1967, the Chairman of the Nevada Gaming Commission during the time in question testified that VFI had completed all the formal requirements for a license by June 28, 1967, and that it had a right to a license on that date. VFI itself had requested that the license be effective as of July 27, 1967. There is no indication that appellants made any attempt to comply with

ment must be complete in order to meet the policy of the Nevada gambling laws. Appellants stress that the corporate-license application form supplied by the state required only the listing of the names of corporate officers and shareholders. Since VFI's application complied with this requirement, they argue, there was no failure to disclose. This argument, if accepted, would turn the detailed statutes governing the control of licensing into a mere formality. Disclosure of nominal officers and shareholders would guarantee legality and shield the very persons as to whom the disclosure requirements are directed. The Attorney General of Nevada in 1960 gave his opinion that N.R.S. § 463.170(2) gave power to state authorities "to require those persons having administrative, policymaking or supervisory interest in the operation to qualify for licensing." To utilize that authority effectively, he stressed, the authorities would need to obtain information about those persons. Official Opinions of the Attorney General of Nevada, 1960-1962, pp. 83-84 (1960). There was no hint that formalities suffice or should be exalted over substance. In this case, the information and indictment emphasized that Zerilli and Polizzi held the real interests in VFI and controlled the nominal shareholders. The trial court, in its instructions on the definition of "owner" as used in the Nevada statutes, stressed the reality of ownership rather than formal titles. (Reporter's Transcript, Vol. 43, p. 8765). These statutes require disclosure of the

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the new, revised statute, which included reporting requirements in many ways more stringent than those in the old statute. *See* N.R.S. § 463.520. Nor is there any indication that the Board sought to require appellants to comply with the new statute. Thus the Board necessarily interpreted the statutes to mean that the old statute rather than the new statute governed applications completed before the new statute went into effect. Such an administrative interpretation is entitled to great weight. See footnote 12, *infra*. Moreover, appellants apparently acquiesced in this interpretation. In these circumstances, the trial court applied the correct statute.

names of all persons with *actual* control or financial interests in the gambling enterprise.[12]

The acts of appellants charged and proven in this case therefore were prohibited by state law.[13] Appellants, however, raise further objections. They contend that, even if they did violate Nevada law, their violations were not *criminal* and therefore do not come within the ambit of § 1952. They characterize their conduct as merely "operating a casino with a state corporate license but without other required state licenses." That theory, however, is based upon the government's contention that all persons with a direct or indirect interest in a gambling casino must be licensed. We find no such requirement in Nevada law.[14]

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[12] The record reveals that the Nevada authorities sought in this case to go "behind" the nominal officers and shareholders and conducted a vigorous investigation to ascertain who controlled VFI. The Court gives weight to the manner in which the Nevada gaming authorities have construed the statutes under which they operate.

[13] Two other theories put forward by the government fail. One involves "piercing the corporate veil." The government argues in its brief that the Nevada statutes "provide the gaming authorities with the necessary authority to go behind the corporate license to *determine who in fact* is controlling the corporation which was granted the gaming license" (emphasis in original). That argument is foreclosed by the trial court's instruction, to which the government did not object, quoted in footnote 6, *supra*. Although that interpretation of N.R.S. § 463.160(1)(a) was not the only one possible, it is not an unreasonable construction. This Court accepts it as the law of this case.

The other theory is that N.R.S. § 463.160(1) requires that anyone with a direct or indirect interest in a gambling enterprise must be licensed. That statute, however, requires only that licenses must be procured as required by the law. N.R.S. § 463.170(2) indicates that a corporation can receive and hold a license itself and that those persons with interests in the corporation must only be *qualified to be* licensed. *See also Berman* v. *Riverside Casino Corporation*, 354 F.2d 43 (9 Cir. 1965).

[14] See footnote 13, *supra*.

The violations of Nevada law in question here were not by VFI, but rather by those in control of VFI who did not disclose the interests of Zerilli and Polizzi. The trial court preserved the corporate fiction and the legality of the gambling operations conducted by the corporation. Hence appellants' argument that N.R.S. § 463.310 specifically establishes only an administrative penalty available to the authorities in this case—revocation of VFI's license—is in error. That provision does set the procedures for disciplinary action against the licensee, but here the licensee has not been prosecuted for violating Nevada law. Since there is no specific penalty prescribed for a violation of N.R.S. § 463.160(1)(c), the "catch-all" section, N.R.S. § 463.360(2)[15] would apply.[16] That violation, there characterized as a gross misdemeanor, would be a *criminal* infraction.[17]

Appellants' second argument is that § 1952 reaches only *wholly* unlawful business enterprises and, since gaming is legal in Nevada, the federal Travel Act does not apply. They cite *United States* v. *Roselli*, 432 F.2d 879 (9 Cir.

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[15] "The violation of any of the provisions of this chapter, the penalty for which is not herein specifically fixed, shall be deemed a gross misdemeanor, and shall be punished by a fine of not less than $1,000, or by imprisonment in the county jail for not less than 6 months, or by both fine and imprisonment."

[16] The Chairman of the Nevada Gaming Commission during the time in question testified that under the law then in effect, "any violation" of that law by individuals would mean that those individuals were guilty of gross misdemeanors where no specific penalty was provided. Reporter's Transcript, Vol. 15, pp. 3028-3029.

Indeed, other than conducting a casino without a license, which is exceedingly unlikely, it is difficult to imagine what N.R.S. § 463.360 (2) would cover if it did not cover conduct such as that proved in this case.

[17] Once a violation of a state criminal statute has been proved it is irrelevant whether that violation is classified as a felony or misdemeanor. *United States* v. *Karigiannis*, 430 F.2d 148, 150 (7 Cir. 1970) (Clark, J.), *cert. denied*, 400 U.S. 904 (1970).

1970), *cert. denied*, 401 U.S. 924 (1971), *rehearing denied*, 402 U.S. 924 (1971), in support. Their reliance upon *Roselli* is misplaced. There the Court accepted only for the purposes of argument the premise that the scope of § 1952 was limited to illegal business enterprises and even on that basis found such an illegal enterprise (432 F.2d 879 at 887-888). Appellants overlook that earlier in that opinion this Court observed:

> "If section 1952 applied only when all business activity was absolutely prohibited in the particular field, the reach of the section would be materially diminished without apparent reason in terms of the statute's purpose. There is no evidence that Congress intended this result." 432 F.2d 879 at 887.

Nor do appellants' general references to the legislative history of § 1952 support this contention.[18] The statutory

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[18] Appellants rely heavily upon the statements of Assistant Attorney General Herbert J. Miller, Jr., of the Justice Department's Criminal Division that:

> "[The Travel Act] bans unlawful businesses—not incidental illegal acts done in the course of lawful businesses." ("Legislation Relating to Organized Crime," Hearings on H. R. 468 et al., Before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess., p. 336 (1961).)

> "Under this bill we would have to show a business enterprise which was unlawful under the laws of the State * * *." ("The Attorney General's Program to Curb Organized Crime and Racketeering," Hearings on S. 1653 et al., Before the Senate Committee on the Judiciary, 87th Congress, 1st Sess., p. 260 (1961).)

In a law review article, the Assistant Attorney General explained the impact of the statutory intention thusly:

> "[T]o turn a gambling * * * scheme into an 'unlawful activity' within the meaning of the 'Travel Act' * * * the 'business enterprise' must involve *illegal* conduct. A program to establish a gambling casino in Las Vegas, Nevada, would not amount to 'unlawful activity.'" (Miller, The "Travel Act": A New Statutory Approach to Organized Crime in the United States, 1 Duquesne L.Rev. 181, 194 (1963) (emphasis in original).)

language is clear. "Section 1952 speaks not of illegal gambling, but of a more inclusive category: 'gambling * * * offenses.'" *United States* v. *Roselli*, 432 F.2d 879, 887 (9 Cir. 1970), *cert. denied*, 401 U.S. 924 (1971), *rehearing denied*, 402 U.S. 924 (1971). *See also Turf Center, Inc.* v. *United States*, 325 F.2d 793, 795 (9 Cir. 1963).

This Court's construction of the scope of § 1952 will not open the federal courts to the prosecutorial abuses which appellants have depicted for the Court: prosecutions of minor illegal acts incidental to an otherwise legal business. The legislative history of § 1952 does demonstrate that its main purposes are to attack organized crime and to aid local authorities in combatting it.[19] Courts would simply not allow it to be used to extend federal prosecutions far from these purposes.[20] *See Erlenbaugh* v. *United States*, 409 U.S. 239, 245 (1972).

We conclude that appellants engaged in a business enterprise involving gambling offenses in violation of Nevada law and 18 U.S.C. § 1952.

II. *Vagueness*

Appellants challenge the statutes under which they have been charged and convicted as being unconstitutionally vague. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. *Lanzetia* v. *New Jersey*, 306 U.S. 451, 453 (1939). Appellants' attack is directed at the Nevada statutes and not the language of § 1952, which has been upheld

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[19] This history is outlined in some detail in *United States* v. *Roselli*, 432 F.2d 879, 884-888 (9 Cir. 1970).

[20] Membership in an organized criminal group is not, of course, an element of an offense under § 1952. *United States* v. *Roselli*, 432 F.2d 879, 885 (9 Cir. 1970), *cert. denied*, 401 U.S. 924 (1971), *rehearing denied*, 402 U.S. 924 (1971). It rests with the courts to determine the reach of § 1952 in a case-by-case manner.

previously against claims of vagueness. *See, e.g., United States* v. *Cozzetti*, 441 F.2d 344, 348 (9 Cir. 1971); *Turf Center, Inc.* v. *United States*, 325 F.2d 793, 795 (9 Cir. 1963); *United States* v. *Smith*, 209 F.Supp. 907, 917-918 (E.D.Ill. 1962). We have already held that the Nevada statutes clearly proscribe the conduct charged against appellants.[21] The construction of those statutes urged by appellants is unreasonable and conflicts with the manifest purpose of the Nevada gambling legislation requiring precise and stringent controls relating to the licensing of gambling. Violation of the statutes in the manner charged against appellants is a criminal offense.[22] In affirming these convictions, we are not enlarging the original legislation by interpretation. *Cf. Bouie* v. *City of Columbia*, 378 U.S. 347, 350-352 (1964); *Pierce* v. *United States*, 314 U.S. 306, 311 (1941).

Moreover, the trial court instructed the jury that specific intent was an element of the offense charged against appellants.[23] Thus the jury found that appellants knew that Nevada law had been violated in the procurement of VFI's license. "A mind intent upon willful evasion is inconsistent with surprised innocence." *United States* v. *Ragen*, 314 U.S. 513, 524 (1942). *See also United States* v. *National Dairy Corp.*, 372 U.S. 29, 33, 35 (1963); *Screws* v. *United States*, 325 U.S. 91, 103 (1945). The record here is clear that appellants were not the helpless victims of an unconstitutionally vague statute.[24]

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[21] See pages 5-10, *supra*.

[22] See page 11, *supra*.

[23] While appellants contend that the instructions on specific intent were erroneous, we find no such error. See pages 17-18, *infra*.

[24] The question of vagueness was considered before Congress enacted § 1952. Assistant Attorney General Herbert J. Miller, Jr., testified before the House Subcommittee that: "It can hardly be contended that the average American citizen does not know if he

III. *Jury Instructions*

A. *Nevada Statutes and Regulations*

Appellants contend that the court below erred in several respects in its instructions to the jury. Certain of these claims concern specific instructions relating to the Nevada statutes. Appellants' objections are based upon a misunderstanding of the government's legal theory of the case. Viewed as a whole, the court's instructions constitute a reasonable construction of § 1952 and the Nevada statutes governing the licensing of gambling operations.

Appellants also argue that it was error to read to the jury without explanation, N.R.S. § 463.130.[25] But that section is a self-explanatory statement of Nevada legislative policy and is important in understanding the purpose and meaning of the other sections. These Nevada statutes form a unified legislative plan; particular sections cannot be fully understood without relating them to the entire statutory scheme. Therefore, under these circumstances, it was not error to read to the jury sections other than N.R.S. §§ 463.160 and 463.200, the two sections upon which the indictment and information were based.

N.R.S. § 463.300, dealing with voting trust agreements, was also read to the jury. Appellants argue that this was confusing, since the court had earlier instructed the jury that the evidence presented had failed to establish a violation of § 463.300. The court refused appellants' instruction which would have directed the jury to disregard all

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is engaged, for example, in 'any business enterprise involving gambling, liquor, narcotics, or prostitution offenses' * * *. Since the bill in addition would require proof of the requisite intent before a violation would be made out, I believe that the scope of H.R. 6572 in no way threatens the activities or rights of any persons other than the organized criminals at whom it is aimed." "Legislation Relating to Organized Crime," Hearings on H.R. 468 et al., Before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess., p. 336 (1961).

[25] See footnote 9, *supra*.

evidence concerning the voting trust agreement. In light of the court's specific instruction, no further instructions were necessary to prevent the jury from finding a violation of § 463.300. It is also highly unlikely that reading that section in these circumstances confused the jury. *Cf. United States* v. *Lookretis*, 422 F.2d 647, 651 (7 Cir. 1970), *cert. denied*, 398 U.S. 904 (1970).

Although conceding that the court properly charged the jury that violations of the regulations of the Nevada State Gaming Commission could not constitute criminal offenses, appellants nevertheless assert that error was committed in instructing that such a violation could be considered as an act in furtherance of a conspiracy. This instruction was proper and necessary in that without it the jury might have thought that it had to disregard completely a violation of the regulations.

B. *Sending Statutes and Regulations to the Jury Room*

Appellants urge that sending the statutes and regulations into the jury room, especially without limiting instructions, was prejudicial error. This question is within the sound discretion of the trial judge. *United States* v. *Gross*, 451 F.2d 1355, 1358-1359 (7 Cir. 1971); *United States* v. *Bearden*, 423 F.2d 805, 813 (5 Cir. 1970), *cert. denied*, 400 U.S. 836 (1970). In this case, the statutes and regulations were extremely complex, and the trial judge may justifiably have believed that it would be better to give the jury the statutes and regulations rather than to have them attempt a reconstruction from notes or from memory. In his effort to avoid confusion, the trial judge did not abuse his discretion.

C. *Reading Indictment and Information to Jury and Sending Copies to Jury Room*

Appellants argue that it was reversible error to read the indictment and information both at the beginning of trial and during the instructions. Given the extraordinary

length and complexity of the trial, however, the trial court may properly have judged that a re-reading was required to avoid confusion.[26] The decision to read the indictment to the jury is within the sound discretion of the trial court, and we find no abuse of that discretion here.[27]

The court below also sent to the jury room copies of the indictment and information. That decision is also generally within the discretion of the trial judge. *United States* v. *Murray*, 492 F.2d 178, 193-194 (9 Cir. 1973); *Souza* v. *United States*, 304 F.2d 274, 280 (9 Cir. 1962). Appellants contend that they should have been advised before closing arguments that the court intended to send the information and indictment. *See Dallago* v. *United States*, 427 F.2d 546, 553 (D.C. Cir. 1969). We agree, but the failure to do so here is not prejudicial error.[28] Under all the circumstances of this case, especially the court's cautionary instruction on the use of the indictment and information and the detailed instructions on what could be considered evidence by the jury, we do not find that error prejudicial in any respect.

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[26] The indictment was first read on February 16, 1972, and re-read on April 19, 1972, an interval of more than two months.

[27] The court instructed the jury as to the indictment and information: "An Indictment or Information is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused." Reporter's Transcript, Vol. 43, pp. 8736-8737.

[28] In *United States* v. *Steed*, 465 F.2d 1310, 1316 (9 Cir. 1972), *cert. denied*, 409 U.S. 1078 (1972), the trial court sent the indictment to the jury room upon the request of the jury during its deliberations. Despite the objections of both counsel, the court held that decision was within its discretion. Counsel stipulated that a cautionary instruction could be affixed to the indictment that was to be sent to the jury. We do not read the case to require affixing such an instruction in all cases in which an indictment is sent to the jury.

D. *Specific Intent*

In claiming error in the court's instructions on specific intent,[29] appellants urge us to follow *United States* v. *Stagman*, 446 F.2d 489, 492-493 (6 Cir. 1971), and hold that specific intent to violate state law is an element of the offense under § 1952. This Court, however, has previously approved an instruction similar to the one given in this case. *See Turf Center, Inc.* v. *United States*, 325 F.2d 793, 797 and n. 5 (9 Cir. 1963). Moreover, to the extent that *Stagman* requires proof that an accused under § 1952 intended to violate state law *himself*, we find that it conflicts with the clear meaning of the language used in § 1952. As the court in *Stagman* recognized, the intent required in the statute "refers to the entire phrase 'to * * * carry on * * * any unlawful activity.'" 446 F.2d at 492. That phrase does not require specific intent to facilitate an activity which the accused knew to be unlawful under state law. This interpretation, apart from its inconsistency with the literal terms of § 1952, also supports the purposes of that statute in attacking organized crime by furnishing federal help to local authorities in their attempts to control such crime. It would not subject innocent persons to criminal jeopardy in travelling interstate since for a conviction, proof would be required at the least "that the defendant intended with bad purpose"[30] to facilitate the violation of state law.

Although the instructions on specific intent, viewed alone, could have been more precise, taking the instructions as a whole, they reasonably informed the jury that they had to

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[29] "[I]t is not necessary that the Government prove that the defendants knew that they were violating Nevada law. The specific intent which the Government must show is the intent to facilitate the carrying on of a business enterprise involving gambling in violation of Nevada law." Reporter's Transcript, Vol. 43, p. 8802. See also pages 8755-8757.

[30] 446 F.2d at 494.

find that appellants knew that what they were facilitating was an unlawful activity under state law.

E. *Advice of Counsel*

As an adjunct to their argument on specific intent, appellants claim that the court should have instructed the jury that reliance on advice of counsel could show a lack of specific intent. Given the evidence in this case, the advice given by counsel was an insignificant factor in the criminal enterprise found by the jury; thus the court below did not err in refusing to give an "advice of counsel" instruction. *See United States* v. *Shewfelt*, 455 F.2d 836, 838-839 (9 Cir. 1972), *cert. denied*, 406 U.S. 944 (1972); *Bisno* v. *United States*, 299 F.2d 711, 719-720 (9 Cir. 1961), *cert. denied*, 370 U.S. 952 (1962).

F. *Kotteakos Instruction*

Appellants contend that they were entitled to a "multiple conspiracy" instruction following the principle of *Kotteakos* v. *United States*, 328 U.S. 750, 767-768 (1946). *See also United States* v. *Griffin*, 464 F.2d 1352, 1355-1357 (9 Cir. 1972), *cert. denied*, 409 U.S. 1009 (1972). Having carefully reviewed the entire reporter's transcript of trial and all documents in evidence, we find that there is no variance between the allegations of the indictment and information and the evidence presented at trial and that therefore the trial court did not err in not giving a "multiple conspiracy" instruction.

G. *Suppression of Evidence*

A letter from appellant Bellanca to Emprise Corporation was not produced by the defense in response to a grand jury subpoena because of a claim of attorney-client privilege. The court gave a general instruction on suppression of evidence, apparently in part on the basis that failure to produce the letter could be evidence of suppression.[31]

[31] See Reporter's Transcript, Vol. 35, pp. 6944-6948.

Appellants also complain of the court's refusal to give an instruction on attorney-client privilege.

Even if the giving of the suppression of evidence instruction were error, we find that the weight of other evidence against appellants is such that the error could not have been prejudicial. The court below, moreover, had instructed the jury on the attorney-client privilege during the trial.[32]

H. *Perjurer's Testimony*

Appellants also claim error in the court's failure to give a cautionary instruction on the testimony of a perjurer. Their initial proposed instruction referred to the witness, Maurice Friedman, as an admitted perjurer when in fact he had been convicted of perjury and had not pled guilty. Appellants submitted a revised instruction after the instructions conference substituting "convicted" for "admitted", but it was rejected as untimely. Even if this were error, which we do not find, any prejudice resulting from it was cured by the instructions given on prior inconsistent statements[33] and on the weight of the testimony of an in-

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[32] The issue of attorney-client privilege arose during the testimony of Virgil Wedge. The court instructed the jury that: "There exists what is known as an attorney-client privilege and it says, in short substance, that when a man goes to a lawyer and tells him sometimes confidential matters that he would want to discuss with a professional man, that that lawyer has the duty of preserving those matters inviolate to public notice and to keep them confidential as long as his client wants him to do so." Reporter's Transcript, Vol. 13, p. 2511.

[33] "The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his previous testimony." Reporter's Transcript, Vol. 43, p. 8749.

former.[34] These instructions sufficiently alerted the jury to the caution necessary in weighing the testimony of a witness like Friedman. *Cf. United States* v. *Evanchik*, 413 F.2d 950, 954 (2 Cir. 1969); *United States* v. *Ross*, 322 F.2d 306, 307 (4 Cir. 1963), *cert. denied*, 375 U.S. 970 (1964).

I. *Skimming*[35]

Appellants argue that the trial court committed error in not admonishing the jury during instructions that the prosecution's argument about "skimming" should be disregarded as unsupported by evidence and as not appearing in the indictment or information. Whatever prejudice to appellants could have resulted from the prosecutor's argument was cured by the trial court's painstaking instructions on the elements of the offenses charged. The trial judge read the language of the information and indictment to the jury and sent copies of them to the jury room. The jury was fully apprised of the charges against appellants; "skimming" was not one of them.

IV. *Prejudicial Publicity*

Appellants claim that they were prejudiced by the publicity given their case both before and during trial and that the trial judge failed to take adequate measures to detect and prevent that prejudice. The pretrial publicity con-

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[34] "The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest or by prejudice against any of the defendants." Reporter's Transcript, Vol. 43, p. 8751.

[35] "Skimming" appears to mean misappropriation of casino funds through falsification of accounts by underreporting the funds flowing into the cashier's office and by unrecorded payments from the cashier's office.

sisted mainly of newspaper articles on the case.[36] These articles commented, for instance, upon the alleged ties of appellants to the Mafia and upon the "skimming" allegations of the prosecution.

Appellants also point to several incidents during trial which in their view also led to prejudicial publicity. Newspaper articles referred, for example, to evidence which had not been admitted linking appellants Zerilli and Polizzi to James Hoffa, the former Teamster official, in a prior attempt to invest in a Las Vegas casino. On another occasion a witness mentioned in the absence of the jury that during a previous recorded and transcribed conversation, he "had in mind" Zerilli and Polizzi when he used the terms "Mafia" and "Cosa Nostra." References to this comment appeared in the newspapers. Later a newspaper disclosed the court's ruling at a sidebar conference sustaining the prosecutor's objection to a question asking Polizzi to explain his testimony on cross-examination that he had been falsely accused by the Department of Justice of being in the Mafia.[37] The prosecutor had mentioned at that sidebar conference surveillance logs of Zerilli and Polizzi disclosing "the whole Mafia organization in Detroit," and the newspaper article referred to that comment. The motion picture *The Godfather* was released during the trial, and a local television personality discussed during his program the book and Zerilli and Polizzi and their alleged links to the Mafia. Finally, after the jury had reached its verdicts, one juror allegedly told defense counsel that other jurors had read newspaper articles

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[36] Appellants also cite the book *The Godfather*, as a factor, since its storyline includes the infiltration of Las Vegas gambling by Mafia figures.

[37] The newspaper apparently learned of the ruling when a reporter, without the government's authorization or knowledge, read its copy of the reporter's daily transcript in which the conference outside the presence of the jury was reported. Thereafter the government took action to prevent recurrence of such an event.

on the case during trial and that this had been "devastating to the defendants." Although this juror had been in the courtroom during a hearing on a motion for a new trial, the court refused appellants' request to have him testify but permitted defense counsel to file affidavits. The juror was subsequently unwilling to submit an affidavit, but defense counsel did file an affidavit purporting to state what the juror had said.

An accused has an unquestioned right to have jurors decide his guilt or innocence who are not biased by what has appeared in the media. In some instances prejudicial publicity before and during trial may be so obvious and overwhelming that an appellate court must overturn a conviction without delving into a detailed analysis of the possibility of prejudice and the judicial action taken to curb it. *See Sheppard* v. *Maxwell,* 384 U.S. 333, 349-352 (1966); *Estes* v. *Texas,* 381 U.S. 532, 542, 544 (1965); *Rideau* v. *Louisiana,* 373 U.S. 723, 726 (1963); *Irvin* v. *Dowd,* 366 U.S. 717, 725 (1961). After a review of appellants' evidence and arguments on this question, we do not find that the situation here reached that extreme, and therefore we do not find "bias or preformed opinion" which would require reversal as a matter of law. *Beck* v. *Washington,* 369 U.S. 541, 557 (1962); *United States* v. *Silverthorne,* 430 F.2d 675, 678 (9 Cir. 1970), *cert. denied,* 400 U.S. 1022 (1971). We must now determine the probability of prejudice in this case and whether the court responded adequately to curtail the chance of an unfair trial. *Marshall* v. *United States,* 360 U.S. 310, 312 (1959).

A. *Pretrial Publicity*

"[T]he trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. * * * [W]hen pretrial publicity is great, the trial judge must exercise correspondingly great care in all aspects of the case relating

to publicity which might tend to defeat or impair the rights of an accused. The judge must insure that the voir dire examination of the jurors affords a fair determination that no prejudice has been fostered." *Silverthorne* v. *United States*, 400 F.2d 627, 637-638 (9 Cir. 1968). In a case of *substantial* pretrial publicity, the voir dire must not simply call for the jurors' subjective assessment of their own impartiality, and it must not be so general that it does not adequately probe the possibility of prejudice. 400 F.2d at 638.

If this case were to be considered closely similar to *Silverthorne, supra*, in the seriousness of the question of prejudice from pretrial publicity, there is little doubt that the initial voir dire was not sufficiently probing to meet the *Silverthorne* standards. The trial judge's questions on pretrial publicity were limited to two questions addressed to the first prospective panel of jurors[38] and later questions addressed to an individual prospective juror.[39] The answers gave no indication of possible prejudice.

We find, however, that the pretrial publicity in this case was not substantial enough to have required the trial judge to interrogate the prospective jurors at length about it.

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[38] "The Court: Have any of you heard anything about the facts of this case except what you have heard in this courtroom today?

"Prospective Jurors: No.

"The Court: I take it when you say you haven't heard of it that means you haven't read anything about it either. Is that correct?

"Prospective Jurors: That's right." Reporter's Transcript of Proceedings of February 15, 1972, p. J-87.

[39] "The Court: Have you heard anything about this case in the newspaper or radio?

"Prospective Juror Schadick: No.

"The Court: If you are a juror and you do hear something about it will you put aside whatever news that should attract your attention as quickly as you could without consuming it?

"Prospective Juror Schadick: Yes." Reporter's Transcript of Proceedings of February 15, 1972, pp. J-126-J-127.

The judge was aware of the publicity, and clearly it was his judgment that the pretrial publicity was not a significant danger to a fair trial.[40] His concern seemed greater about the possible effects of publicity during trial. The pretrial publicity in this case does not resemble the situation in *Silverthorne* v. *United States*, 400 F.2d 627, 639 (1968). Unless a trial judge clearly has erred in his estimation of the action needed to uncover and prevent prejudice from pretrial publicity, an appellate court should not intervene and impose its estimate. The court closest to the situation can best evaluate the proper way to walk the difficult line between a vigorous voir dire to determine any possible bias and avoidance of creating bias by specific questions which add "fuel to the flames" in suggesting the presence of controversial issues. *Beck* v. *Washington*, 369 U.S. 541, 548 (1962). The court below did not abuse its discretion by the way it handled the question of pretrial publicity.

B. *Publicity During Trial*

When the possibility of prejudice from publicity arises during trial, the trial court has "the affirmative duty * * * to take positive action to ascertain the existence of improper influences on the jurors' deliberative qualifications and to take whatever steps are necessary to diminish or

[40] A trial judge in a noteworthy and controversial case cannot be expected to impanel jurors who have not heard about the case. "In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. * * * To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin* v. *Dowd*, 366 U.S. 717, 722-723 (1961).

eradicate such improprieties." *Silverthorne* v. *United States*, 400 F.2d 627, 643 (9 Cir. 1968). See also *Gordon* v. *United States*, 438 F.2d 858, 872-873 (5 Cir. 1971), *cert. denied*, 404 U.S. 828 (1971), *rehearing denied*, 404 U.S. 960 (1971). The better practice, if there is a clear chance of prejudice, is for the court to interrogate each juror in camera about the possibly prejudicial publicity. *Silverthorne* v. *United States*, 400 F.2d 627, 644 (9 Cir. 1968); *Coppedge* v. *United States*, 272 F.2d 504, 508 (D.C. Cir. 1959). The trial judge carries a difficult burden. He is called upon to question the jurors, but repeated questioning could itself be prejudicial in inciting in the jurors "joint or individual curiosity and encourage attempts to read the very newspaper articles sought to be kept from their knowledge." *Silverthorne* v. *United States*, 400 F.2d 627, 643 (9 Cir. 1968). His very questions may disclose or accentuate controversial issues. Unless he has clearly abused his discretion, we shall uphold the trial judge's delicate estimation of the needs of the case of which he has first-hand experience.

During his initial voir dire of prospective jurors, the judge indicated that the jurors would not be sequestered but that they would be expected to avoid hearing or seeing anything about the case.[41] One prospective juror was questioned about adherence to that admonition; she indicated

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[41] "The Court: I am not so sure that this will happen, but it may. There may be some newspaper attention given this case, or there may be some talk about it on the radio or television. If you are selected as a juror in this case I am going to admonish you that when you leave here and go to your home and pick up the paper, if you should pick it up and see something about this case I am going to admonish you to put the paper down right away and to read no more of that article, because I don't want anything coming to your attention other than that which is directed to you through the rules of evidence that we have and that will come from this courtroom.

"I will also tell you to blind yourself to the subject on TV and to deafen yourself to the subject on radio if it should happen.

"Are there any of you who if you were a member of the jury

that she would find it difficult to follow and was excused. Appellants argue that allowing the jurors to read newspapers with the admonition to avoid stories on the trial after glancing at headlines itself raised enough possibility of prejudice to require reversal. We disagree. The relevant questions are the nature of the headlines and the actions taken by the court to cure any possibility of prejudice.[42]

Early in the trial on February 24, 1972, the court again admonished the jury to avoid any publicity about the case.[43]

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in this case would feel that you shouldn't have to obey such admonition at all, and 'I am going to read what I please and listen to what I want to'—would any of you be inclined to do that?

"Prospective Jurors: No.

"The Court: Would you understand that there is a compelling reason for this Court to ask you to insulate yourselves from other information that may come to you through newspapers or through other media about this case, you understand that there is a reason for my doing so?

"Prospective Jurors: Yes." Reporter's Transcript of Proceedings of February 15, 1972, pp. J-87-J-88.

[42] Cases cited by appellants are readily distinguishable from this case. In *United States* v. *Rattenni*, 480 F.2d 195, 196 (2 Cir. 1973) (Clark, J.), a juror admitted "her prejudice against Rattenni on the remaining open charges against him as well as in all of the charges against his co-defendants". In *United States* v. *Thomas*, 463 F.2d 1061, 1062-1063 (7 Cir. 1972), a juror disclosed that certain jurors had "argued from" a newspaper article which they displayed during their deliberations and that several votes were required before all jurors decided to vote for conviction. In *Mares* v. *United States*, 383 F.2d 805, 809 (10 Cir. 1967), *cert. denied*, 394 U.S. 963 (1969), an article reported a withdrawn guilty plea and an excluded confession, probably the most conclusively prejudicial publicity possible, and the court took no steps to determine the jury's exposure to it.

[43] "May I remind the jury once again about the earlier admonition about reading any publicity that may be in the newspapers about this case, or watching any news concerning this case on TV or radio. Please be mindful of the importance of the admonition that I have told you about concerning that." Reporter's Transcript, Vol. 6, p. 1319.

The very next day, after newspaper stories linking Zerilli and Polizzi to James Hoffa, the court undertook an in camera interrogation of each juror separately, in the absence of all defendants, counsel and other jurors. The judge asked whether they had read the articles and whether they had seen or heard anything about the case in the newspapers, on television, or on the radio. He also gave them another general admonition. Nothing said by any of the jurors during this interrogation revealed a possibility of prejudice from the publicity.[44] We agree with

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[44] The court gave a fair and complete report of the interrogation to the parties and counsel:

"One juror indicated that several days ago he heard on the Long Beach radio station that a jury had been selected in this case, but that he had heard nothing else on radio. All the other jurors indicated that they had heard nothing on radio or on TV about the case.

"Mr. Dewey said that he saw the Los Angeles Times in the jury room this morning, but as soon as he saw it he pushed it aside and did not read the paper at all.

"Mr. Ford stated that he had not read either of the articles, but that four or five days ago he saw an article in the paper saying that a jury had been selected in the case.

"Mr. Foss said that he saw the headline in last night's Herald Examiner, but that he did not read the article, and that he did not read the article in the Times.

"Each of the other jurors indicated that he or she had not read either of the articles and had heard nothing on radio or TV. This inquiry includes the alternates.

"I admonished each against reading any future articles and received the promise of each that he would not read any newspaper articles about this case or listen to any account of it on radio or TV.

"Each person was asked if anything had happened to this point to prejudice him or her against any defendant, and each indicated that nothing had.

"I see no reason at this point to declare a mistrial, but if any counsel desires to be orally heard on such a motion I will hear it at a later time in the day." Reporter's Transcript, Vol. 7, pp. 1348-1349

appellants that it would have been preferable to ask each juror about the newspaper carrying the Hoffa story which apparently was in the jury room, but each juror's other answers would have to be willful falsehoods if each had in fact read the article in the jury room. If the jurors had read the story, "[e]ven the most biased argument would be hard put to suggest that all twelve jurors, sworn to try the indictments fairly would deliberately break their oaths by remaining in the box, having read the items, instead of bowing out under the wise protection of the court and saving not only their dignity but their honor." *United States* v. *Carlucci*, 288 F.2d 691, 696 (3 Cir. 1961), *cert. denied*, 366 U.S. 961 (1961).

On March 9, 1972, after newspaper articles were published referring to appellants and their links to organized crime as discovered by United States Senate investigators, the court declined to question the jurors again, in the belief that new questioning could itself undermine the jury's belief in its own integrity.[45] On March 21, 1972, after the leak of the ruling at the sidebar conference, the court, having the opportunity to observe on a daily basis the demeanor of the jurors and after expressing his confidence in their ability to obey his admonitions, again declined to interrogate the jurors anew.[46]

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[45] "Now wouldn't you think that if you were on this jury and every second day I came to you and said, now you are not reading any newspapers, are you, wouldn't you think that I had little enough trust in the integrity of these jurors?" Reporter's Transcript, Vol. 16, p. 3152.

[46] "[M]y concern is with this jury and my concern is that your clients and the Government will get a fair trial in this case, and I have gone to the efforts that you have just described to admonish the jury time and again and to talk with them individually about their responsibility not to read the newspapers or any accounts of this trial from the newspapers, and I have reason to believe that they are going to obey that admonition because I have impressed upon them the importance of doing so." Reporter's Transcript, Vol. 24, p. 4711.

On April 3, 1972, the trial court on its own motion conducted an in camera questioning of each juror.[47] Again defendants, counsel, and the other jurors were not present. He asked them generally whether they had read, seen, or heard anything in the media about the case. The jurors indicated that they had not. Appellants argue that Juror Foss, whose family was keeping a scrapbook of articles concerning the trial, must have been exposed to publicity surrounding the case. Here is the record:

> "The Court: Mr. Foss, you will recall that some time ago I called the jurors in one at a time to ask them if they had read any newspaper articles about this case and because of the length of the trial I thought it wise to emphasize it again and to call them in to ask if they had read any newspaper articles about the case. Have you read any?
>
> "Juror Foss: No. My people cut the articles out of the paper before they give me the paper. Before they bring the paper to me in the morning they cut everything out. They have got it in a scrapbook somewhere.
>
> "The Court: And you will wait until the case is over before you read it?
>
> "Juror Foss: I won't read anything about the case.
>
> "The Court: That is fine.
>
> "Juror Foss: I will decide it on the facts in the courtroom." Reporter's Transcript, Vol. 31, pp. 6010-6011.

The argument is frivolous.

After the verdicts were reached, the trial judge questioned each juror separately in his chambers. He stressed on this occasion whether the term "Mafia" or related terms

[47] Reporter's Transcript, Vol. 31, pp. 6008-6024.

had been factors in the jury's deliberations.[48] It seems that the terms were discussed briefly at the beginning of the jury's deliberations and once during a lunchtime, but the jurors agreed that those terms and issues had not been factors in their decisions. The judge also asked them about

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[48] The court's questions and each juror's response relating to the "Mafia" issue were as follows:

"The Court: Now has anything, any mention of the word 'Mafia' or 'Cosa Nostra' or anything like that that may have happened during this trial brought about anything in your thinking that in your opinion led to these verdicts?

"Juror Dewey: No. We threw that out the first day we were in because, we brought it up in our minds whether anybody thought about it, I don't think they are on trial here for that, that is not the question of what we heard, the fact that somebody mentioned the name in there or something like that, there was no evidence to substantiate anything like that anyway, and that isn't what we looked at in there."

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"The Court: All right. You said that on the first day you were in deliberation, as I understood you to say, that the jurors asked each other, did they?

"Juror Dewey: No, I think it was just an informal thing, that we just said, we are going to go by the evidence and forget the statements that were made that didn't have any bearing on the case.

"The Court: And that would have included any reference to Mafia or Cosa Nostra?

"Juror Dewey: I don't think we got down and said the words just to the effect that we will stick to the evidence and that was all."

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"The Court: Do you know that any mention during the trial of the words 'Mafia' or any related term had any effect upon the verdicts that were reached?

"Juror Ford: No, I don't think that that influenced anybody. I think a lot of times these people just think it is really fictional to a great degree, they think it is a bogeyman word and that it is not anything real, that it is exaggerated.

"The Court: Mr. Dewey tells me that at the outset during the deliberations there was some informal talk about whether

their exposure to the book and the motion picture *The Godfather*. Two jurors had read the book, but said that it had not influenced their decisions. He asked all but four jurors general questions about their exposure to newspaper, television, and radio publicity, again without any revelations of possible prejudice.

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any of these terms have influenced anybody or brought any trouble to this trial, and he seems to say that there was some general discussion about it so that you could kind of clear the decks on that right away, is that true?

"Juror Ford: Yes. They had, you know, some of them didn't even know what the term meant, what it was all about, some weren't familiar with it, some had heard of it but only in something that they had seen or heard."

* * * * *

"The Court: I am told that there was some discussion at the outset in the jury room by the jurors about these terms 'Mafia' and related terms and that you decided you were just going to have a discussion about it and get it out of the way.

"Juror Foss: I don't think that that had anything to do with the verdicts.

"The Court: There was the question I was going to ask, whether you think that any of these terms inflamed the jury members in any way. Do you think so?

"Juror Foss: No, I am sure they did not."

* * * * *

[For the entire transcript of the interrogation of Juror Palmer, see footnote 50, *infra*.]

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"The Court: Do you think any mention of the words 'Mafia' or related terms had any influence at all on any of these jurors?

Juror Beth: No, I don't think anybody even thought anything about it. I know I didn't. It didn't bother me a bit."

* * * * *

"The Court: * * * Now there was some discussion during the trial of the word 'Mafia' and related terms.

"Juror Daniels: Sure.

Finally, on June 12, 1972, at a hearing on a motion for a new trial, defense counsel told the court of juror Palmer's revelation that other jurors had been reading newspaper stories about the case and that it had been "devastating to

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"The Court: Do you think that any discussion of that word adversely affected any of these defendants?

"Juror Daniels: No, your Honor, because we didn't even during the time of our deliberations, we never did, even the word 'Mafia' was not even entertained or brought forth."

* * * * *

"Juror Mirick: * * * [W]e threw out when we first went in there any talk of Mafia * * *.

"The Court: * * * Now do you think that the use of these words 'Mafia' and related words at all influenced any of these jurors?

"Juror Mirick: No, I am sure not."

* * * * *

"The Court: The word 'Mafia' and related terms were bandied about a little bit during the time of the trial. Do you think that that inflamed the jury in any way?

"Juror Hoeffler: No.

"The Court: Do you think that it had any adverse effect at all on any of these defendants?

"Juror Hoeffler: Would you say that again?

"The Court: Do you think that the use of that term 'Mafia' and so forth had any adverse effect on these defendants? Did any of you use it, we will say, against any of these defendants or use it in reaching your verdicts?

"Juror Hoeffler: No, sir."

* * * * *

"The Court: Now what about during the deliberations, during the course of the trial the word 'Mafia' came up and related terms to that also. Do you think that any mention of that had any adverse effect upon any of these defendants?

"Juror Stroops: No, sir. I don't think we—I know we didn't pay any attention. I think it was just in one thing, it was in Mr. Friedman's just one time, I think in his testimony it was just one time we seen it in the testimony. * * *"

* * * * *

the defendants." The court refused defense counsel's request for an immediate examination of jurors Palmer and Dewey who were in the courtroom, but stated that counsel could file affidavits on the matter. Palmer subsequently refused to submit an affidavit, although defense counsel did submit two affidavits.[49] While it may generally be pref-

"The Court: There was during the trial the mention of the word 'Mafia' and some related terms. Do you think that that adversely affected any of these defendants?

"Juror Montejano: No, your Honor. I think if anything it might have helped us to even try to be really applying ourselves and just go by the facts.

"The Court: Now some have said that at the outset of your deliberations that there was some discussion of the effect of these terms, 'Mafia,' and so forth in the jury room, and you decided to clear the decks concerning it in that manner.

"Juror Montejano: That is right."

* * * * *

"The Court: Do you think that the mention during the trial of the word 'Mafia' or any related such term did it have any adverse influence upon any member of this jury to your knowledge against any of these defendants?

"Juror McDonald: No, sir, absolutely not."

* * * * *

"The Court: There was a mention during the trial of the word 'Mafia' and some related terms. Do you think that anybody on this jury related any of these terms to any of these defendants?

"Juror Plant: No, sir.

"The Court: Did it in your opinion have any effect at all in the verdicts that were reached?

"Juror Plant: No, sir."

Reporter's Transcript, Vol. 46, pp. 8997-8998, 9000-9001, 9003, 9009, 9011, 9013, 9015, 9018, 9020, 9023, 9026.

[49] Counsel for appellant Zerilli submitted the following affidavit, dated June 16, 1972:

"William J. Weinstein, being first duly sworn, deposes and says:

* * * * *

"On June 12, 1972, prior to the commencement of the court proceedings in the morning on the motions for new trial, I saw

erable for the trial court to allow such an examination of jurors in order to dispel any doubts as to the integrity of the jury's deliberations, such action was not required here. The trial judge, after having questioned juror Palmer on three separate occasions during and immediately after trial in the privacy of his chambers, could understandably

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Alfred Palmer, one of the jurors at the trial of the above case, in the hallway outside the courtroom. We said 'hello' to each other, and I then talked to Agnar Wahlberg, one of the court reporters.

"A few minutes later I went into the courtroom. Mr. Palmer was then sitting in the courtroom. I said 'hello' to him again, and I remarked that the five days of deliberation of the jury indicated the dedicated work of the jury.

"I was about to walk to the counsel table, but before I could do so Mr. Palmer made substantially the following statement:

"'We tried to be conscientious. But the newspaper publicity of the trial was devastating to the defendants. You can't keep those jurors from reading the newspapers.'

"I then stopped and inquired about this, and I asked Mr. Palmer if he was referring to the Hoffa story.

"His reply was substantially as follows:

"'More than that. The jury was reading about the case every day.'

"Mr. Palmer further stated that he himself had not read the newspaper articles concerning the case during the trial, but that he had read them after the trial, and that he could now understand how many of the other jurors felt during the trial. He said he felt that the Los Angeles Herald-Examiner was more damaging than the Los Angeles Times.

"Mr. Palmer also stated that the people in his office work hard and then go to Las Vegas and lose their money, and that he thought this was wrong. I then asked him how he felt about horse racing, and he said he thought that horse racing was the same."

have been skeptical of such a belated attack on the jury's verdicts. The record is not barren on this point,[50] and the

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[50] In his first interrogation of the jurors, the trial judge asked Palmer about his own exposure to the media. Palmer answered that he had not read, seen, or heard anything about the case. Reporter's Transcript, Vol. 7, pp. 1330-1332. During the second voir dire, Palmer again failed to mention any problem with the publicity. Reporter's Transcript, Vol. 31, pp. 6011-6012. The post-trial interrogation of juror Palmer is set out in full below:

"The Court: Come in, Mr. Palmer.

"Juror Palmer: Thank you, sir.

"I owe you an apology for being the black sheep, the only one that said yes when I should have said no.

"The Court: No apology needed at all.

"Juror Palmer: The count was seven to five and I still feel that if we had had another session we could have come out on it. [This reference is to the jury's failure to reach a verdict as to defendant Polizzi on Count 3 of the indictment. See p. 8987.]

"The Court: My purpose here now is to ask you some questions about the case. Do you think that anything happened outside of this courtroom during the trial of this case that in any way influenced the verdict in the case?

"Juror Palmer: Well, I will put it this way, not that I know of. As far as myself is concerned, no, but as to others I am not too sure.

"The Court: Yes. Now is there anything about that, that leads you to suspect that anything happened?

"Juror Palmer: Well, I would rather hesitatingly say no.

"The Court: Read that answer to me.

"(Record read.)

"Juror Palmer: I think you well know in your experience that when folks get together outside, going to lunch or something like that, you can't very well stop them from talking about it among themselves, you know what I mean, just among ourselves, and I think some of that was done but I don't want to accuse anybody of it.

"The Court: Yes. All right. Now do you think that anybody reached any decisions about the case before the case was turned over to the jury?

"Juror Palmer: I don't think so. None were expressed to me, no, sir.

"The Court: Mr. Palmer, there is a picture called The Godfather. Have you seen that picture?

court could reasonably have found juror Palmer's disclosure as reported by defense counsel unworthy of belief.

"Juror Palmer: No, sir, I have not.

"The Court: Have you read the book by the same name?

"Juror Palmer: No, sir. In fact, I never heard of it until you mentioned it.

"The Court: Was there any discussion of either the picture or the book in that jury room?

"Juror Palmer: No, sir, not that I know of, not that I heard.

"The Court: Do you think that the mention during this trial of any of the terms such as 'Mafia' or related terms had any unfavorable influence on the verdicts that were reached?

"Juror Palmer: Well, to be frank and honest with you, I hope I won't get into trouble by doing so, I think some of that was mentioned during the lunch hour between some of the members of the jury.

"The Court: In what respect?

"Juror Palmer: Well, it was just the fact that it came up during the trial, the Chief of Police of Detroit accused some of our defendants of being members of it, they threatened him with suit and the suit was never filed because they thought they couldn't win it, the defendants I mean. Do I make myself clear?

"The Court: Yes, I think so. What you are saying is that during a lunch hour that there was some discussion of the evidence, is that correct?

"Juror Palmer: I was told somewhere that that come out in the local papers during the trial, and I think that was discussed during the lunch hour between some of the members. I don't want to hold up my right hand and swear to that, your Honor.

"The Court: Did you hear it yourself?

"Juror Palmer: Indirectly, yes.

"The Court: What do you mean by 'indirectly'?

"Juror Palmer: Well, they were some distance away from me, that is what I think they were talking about, but I couldn't convict them of it, I heard the word 'Mafia' mentioned and that kind of thing, and that was all, but I don't think there was any prejudice to it as far as that is concerned because it was admitted it was not to be considered in the trial. It was, shall I say, outlawed.

"The Court: Do you think that anybody did consider that in the deliberations in this case?

"Juror Palmer: I don't believe so, no, sir.

"The Court: Any comment or any discussion about it in the deliberations?

Palmer's unwillingness to submit an affidavit strongly supports that judgment.[51]

In this case the problem of publicity was not insignificant, but it was a problem that was handled by proper judicial supervision. "The right to publish a prejudicial article does not carry with it the right of an accused to an automatic mistrial. Such an outcome would give to the press a power over judicial proceedings which may not be countenanced." *Mares* v. *United States*, 383 F.2d 805, 808 (10 Cir. 1967), *cert. denied*, 394 U.S. 963 (1969). After our detailed review, we cannot say that there is a serious possibility that the jury was influenced by considerations apart from evidence properly admitted at trial. The trial judge admonished the jury on at least four occasions to avoid publicity about the case. He interrogated the jurors individually three times. The fact that the jurors discussed the term "Mafia" and related issues does not in itself require reversal. *Cf. United States* v. *Lazarus*, 425 F.2d 638, 640-641 (9 Cir. 1970), *cert. denied*, 400 U.S. 869 (1970), *rehearing denied*, 400 U.S. 954 (1970). For appellants'

"Juror Palmer: No, sir, nothing. I never heard the word mentioned during the deliberation time, no, sir.

"The Court: All right. I think those are the questions that I wanted to ask you. And thank you again.

"Juror Palmer: Let me say it has been a pleasure to work with you. I hope I get a chance to do it again.

"The Court: It has been a pleasure working with you.

"Juror Palmer: Thank you."

Reporter's Transcript, Vol. 46, pp. 9005-9008.

[51] A case cited by appellants in support of their contention that juror Palmer's revelations indicate jury bias is easily distinguished from this case. *United States* v. *Thomas*, 463 F.2d 1061, 1062 (7 Cir. 1972), involved the disclosure by a juror the morning after the jury had deliberated, and reached a verdict that jurors "who chose to vote for conviction argued from [a newspaper] article which they displayed and to which they repeatedly referred." Here Palmer's disclosure as reported by appellants' counsel came approximately six weeks after the verdict had been reached, and there were good reasons for disbelieving that disclosure.

arguments of prejudice and juror Palmer's disclosure to be true, the other jurors would in effect have committed perjury on several occasions and have entered into a conspiracy of silence. The trial judge found that incredible. We agree. "Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct." *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933) (Brandeis, J.). "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day." *Holt* v. *United States*, 218 U.S. 245, 251 (1910) (Holmes, J.). No reversible error was committed in the trial court's handling of the question of prejudicial publicity; we do not find "that the probability of prejudice arose and was not eliminated." *Silverthorne* v. *United States*, 400 F.2d 627, 644 (9 Cir. 1968).

V. *Department of Justice "Mafia" List*

The United States Department of Justice in 1969 included appellants Zerilli and Polizzi on a list of known Mafia figures. See 115 Cong. Rec., Part 17, pp. 23440-23441 (August 12, 1969). Appellants contend that the presence of those names on that list was the motivating factor in the prosecution of this case and also that the prosecution made several prejudicial comments, based upon appellants' alleged Mafia connections, to the grand and petit juries.

Their first point, that their inclusion on the "Mafia list" was the prime motivation for the prosecution, is not supported by anything in the record and is strongly contradicted by the testimony of three government officials prominent in this prosecution.[52]

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[52] The Honorable W. Matthew Byrne, Jr., United States District Judge, and who was United States Attorney in Los Angeles during the initial stages of this case, testified that interviews with Maurice Friedman were "the basis for the commencement of the investiga-

The next contention, that the prosecution "poisoned" the grand jury proceedings by comments referring to the Mafia, is unsupported by the record or by the authorities appellants cite. The portions of the transcript of the proceedings before the grand jury which appellants quote in their opening brief are not evidence of grand jury bias. "Mafia" is mentioned by the prosecutor in one question. The possible use of force is the basis of four questions referring to appellant Shapiro. One witness is asked whether he is fearful or apprehensive as a result of his testimony. Appellants allege that the grand jury was "repeatedly told" of a prior arrest of appellant Zerilli; and the prosecutor commented on the alleged association of Zerilli and Polizzi with "tough guys, Italians, from New York."

Appellants have a difficult burden to satisfy in their challenge to the indictment. "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." *Costello* v. *United States*, 350 U.S. 359, 363 (1956). A valid indictment does not require support by "adequate or competent

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tion and the commencement of grand jury investigation regarding the Frontier case." Reporter's Transcript, Vol. 48, p. 9224. He did not recall having ever seen the "Mafia list." Reporter's Transcript, Vol. 51, pp. 9824-9825. David Nissen, chief of special prosecutions in the organized crime and racketeering section of the United States Attorney's office in Los Angeles at the time, also testified that Friedman's information was the basis for the decision to convene a grand jury. Reporter's Transcript, Vol. 51, p. 10,031. He denied that the "Mafia list" played any role in developing his interest in beginning the prosecution. Reporter's Transcript, Vol. 52, p. 10,220. Wayne W. Hill, a special agent with the F.B.I., also testified that the Friedman interviews provided the basis for initiating the prosecution. Reporter's Transcript, Vol. 49, pp. 9412-9418. He too denied ever having seen the "Mafia list." Reporter's Transcript, Vol. 50, p. 9714.

evidence." 350 U.S. at 364.[53] *See also United States* v. *Calandra*, — U.S. — (1974). Appellants have not demonstrated a reasonable inference of bias on the part of the grand jury resulting from the comments of the prosecutor.[54] *See Beck* v. *Washington*, 369 U.S. 541, 545-549 (1962). "The quantum of evidence necessary to indict is not as great as that necessary to convict. If a grand jury is prejudiced by outside sources when in fact there is insufficient evidence to indict, the greatest safeguard to the liberty of the accused is the petit jury and the rules governing its determination of a defendant's guilt or innocence. And, if impartiality among the petit jurors is wanting, the cure is reversal by the appellate courts." *Silverthorne* v. *United States*, 400 F.2d 627, 634 (9 Cir. 1968).[55]

Appellants also argue that the "Mafia list" played an impermissible role in the trial. They refer, however, only to the comments of the prosecutor in closing argument that appellants "substituted the corporate resolution for the

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[53] The recent decision cited by appellants, *United States* v. *Estepa*, 471 F.2d 1132, 1137 (2 Cir. 1972), condemns the *needless* use of hearsay testimony before the grand jury and is irrelevant to appellants' claims.

[54] References to "Mafia" and "Italians" are certainly not per se prejudicial. *Cf. United States* v. *Lazarus*, 425 F.2d 638, 640-641 (9 Cir. 1970), *cert. denied*, 400 U.S. 869 (1970), *rehearing denied*, 400 U.S. 954 (1970).

[55] Those cases upon which appellants rely concerned prosecutor misconduct in arguments to the petit jury. *Berger* v. *United States*, 295 U.S. 78 (1935); *United States* v. *Cummings*, 468 F.2d 274, 277-278 (9 Cir. 1972); *Hall* v. *United States*, 419 F.2d 582 (5 Cir. 1969). This distinction does not justify, of course, prosecutor misconduct before the grand jury. See A.B.A. Standards Relating to the Prosecution Function, Approved Draft, 1971, § 3.5(b). It does mean that it takes very substantial evidence of grand jury bias for an appellate court to reverse a conviction because of an indictment returned by an allegedly biased grand jury.

pistol."[56] Although it is unclear that these comments were related to the "Mafia list" in any event appellants have failed to demonstrate that the comments contributed to an unfair trial. The trial judge specifically inquired of each juror in camera in a post-verdict voir dire as to the influence on the jurors of terms such as "Mafia," with no indication that they had influenced the verdicts.[57]

VI. *Cross-Examination on Reputation*

Appellants argue that the trial court committed reversible error in allowing the prosecution to cross-examine Polizzi and Zerilli on their reputations. The government contends that the cross-examination was permissible as to Polizzi because he had opened the subject of his reputation on direct examination and as to Zerilli in order to impeach his testimony about why he could not be licensed.

"The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." *Michelson* v. *United States*, 335 U.S. 469, 479 (1948). Throughout the presentation of its case, the prosecution avoided raising the issue of the Mafia links of Zerilli and Polizzi in demonstrating that they could not themselves obtain licenses from the Nevada authorities. On direct examination Polizzi testified that the reason why he could not be licensed was that he had a "problem." He never described the

[56] "I think I told you at the outset that this is nothing more than sophisticated robbery, sophisticated theft. And these businessmen have learned it is better to use a corporate resolution than a pistol." Reporter's Transcript, Vol. 43, p. 8683.

"In short * * * the principals have learned that a corporate resolution is more deadly and more effective than a pistol, and the changes of apprehension and proof are considerably more difficult." Reporter's Transcript, Vol. 39, p. 7995.

[57] See pages 29-32, *supra*.

specifics of this problem. These statements did not open the question of Polizzi's reputation for cross-examination. Appellants could reasonably have understood that references to Mafia links and reputation were to be avoided. The important point for the prosecution was that Polizzi had serious problems preventing him from obtaining a license and thus motivating him to acquire a hidden interest; what the specific problems were was not directly relevant. The danger of prejudice certainly outweighed whatever slight probative value a more specific line of questioning may have had.

The government attempts to justify its cross-examination of Zerilli in terms of impeaching his testimony on the reasons why he could not be licensed. His testimony, however, really concerned what his attorney had told him were the reasons. Thus the government's impeachment was more directed at the attorney than Zerilli, unless it could have been shown that Zerilli was misrepresenting what the attorney had told him. With the probative value of the government's questioning on Zerilli's reputation at best speculative, it was error to permit the government to begin a line of questioning with a high possibility of prejudice.

Though the court's rulings were erroneous, appellants were not prejudiced by them. The court questioned the jurors individually in camera after they had reached their verdicts on the influence of the Mafia issue and was satisfied that it had not been a factor in their decisions. We have found that he did not commit error in making that determination,[58] and it precludes reversal on this issue.

VII. *Misconduct of the Prosecutor and Trial Judge*

Appellants cite many episodes of what they assert to be misconduct by the prosecutor, sanctioned by the trial judge, which deprived them of a fair trial. After having carefully

[58] See pages 29-32, *supra*.

reviewed each of these assertions, we do not find that they amount to a deprivation of appellants' right to a fair trial. No good would be served by a discussion of each of the points raised, but we shall discuss several representative claims.[59]

In his closing arguments, the prosecutor did make comments which could have conveyed the impression that appellants were violent individuals.[60] This question, however, is tied closely to the issue of the influence of the Mafia references on the jury. We have found that the court below carefully handled that issue,[61] and we find that these comments were not so prejudicial to appellants so as to require reversal of the jury's verdicts.

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[59] Those points not discussed are appellants' contentions that the prosecutor misstated facts and evidence throughout the trial; that the court delayed too long in giving appellants' counsel opportunities to argue their objections to the prosecutor's conduct; that the prosecutor was allowed to argue law, and misrepresent the law, in his arguments to the jury; that the prosecutor improperly asked witnesses to "square" their testimony with that of other witnesses; that the prosecutor intentionally misrepresented to the court what he expected the testimony of a witness would be; that the exhibits were mishandled and that the jury may have had in the jury room exhibits not admitted into evidence; that side-bar conferences were audible to the jury mainly through the fault of the prosecutor; and that the trial judge changed certain "ground rules" to the prejudice of appellants. We have, however, carefully considered each of these points and, based upon our review of the entire record, find them to be without merit.

[60] "That is the good old fashioned Chicago type extortion." Reporter's Transcript, Vol. 39, p. 7983. This particular reference was to testimony in the record which indicated perhaps some potential for violence during the events in question in this case. See witness Friedman's testimony of his mysterious and rather frightening trip to Toledo, Ohio. Reporter's Transcript, Vol. 5, pp. 1084-1098. The comment was not proper, however. See also the comments quoted in footnote 56, *supra*.

[61] See pages 29-32, *supra*.

Appellants argue that the prosecutor gave his personal opinion of appellants' guilt to the jury and referred to the indictment in this case as supporting him. The prosecutor did mention the grand jury indictment, but he used it to rebut appellants' argument to the jury that the prosecutor was pursuing in effect a personal vendetta against appellants.[62] The reference to the indictment in these circumstances does not constitute improper argument. *Cf. United States* v. *Cummings*, 468 F.2d 274, 277-278 (9 Cir. 1972); *Hall* v. *United States*, 419 F.2d 582, 587 (5 Cir. 1969). Moreover, the jury was instructed that the indictment and information were not evidence and were merely methods of accusing a defendant of a crime. Reporter's Transcript, Vol. 43, pp. 8736-8737.

On four occasions, in ruling on questions addressed to two government witnesses, the trial judge made comments that appear to vouch for the credibility of the witnesses. However, we cannot accept the appellants' assertions of prejudice. They did not object to any of the judge's statements, and they certainly knew how to object when they thought it important to do so. The error, if any, could

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[62] Defense counsel had argued: "The thing that impressed me and rather frightened me was the display of overwhelming power of the Federal Government if one of their prosecutors gets a theory and takes after you." Reporter's Transcript, Vol. 42, p. 8391.

The prosecutor then argued: "* * * But Mr. Ball has made a statement that I must make one remark to. He says he is worried because a prosecutor gets you on a theory and a statute and he goes after you.

"Not true. Never has been true in the legal system in this country or the body of criminal law that has only been around for 550 years. Never has been true and it is not true during this trial.

"A grand jury passed on this indictment. Not Kotoske. When it is read to you, the judge will read, 'The Grand Jury charges'. Not Tom Kotoske." Reporter's Transcript, Vol. 43, p. 8692.

Earlier in his argument, the prosecutor had also referred to the indictment in trying to show that the government had been consistent in asserting a legal theory under § 1952. See Reporter's Transcript, Vol. 43, p. 8680.

easily have been corrected, had there been objection. For example, in one instance, at the end of the colloquy, the court said "* * * in any instance the jury is to draw no inference from the questions as bringing any truthfulness to us." Reporter's Transcript, Vol. 2, p. 244. The court, moreover, instructed the jury not to assume from his comments during trial that he held particular opinions about the issues in question and that they were the sole judges of the credibility of witnesses and of the weight of evidence. *See United States* v. *Jackson,* 482 F.2d 1167, 1175-1176 (10 Cir. 1973); *United States* v. *Cunningham,* 423 F.2d 1269, 1276 (4 Cir. 1970).

Appellants contend that the trial court first received evidence, in the presence of the jury, on the question of the applicable Nevada law, rendering the matter one for the jury's decision, but then at the end of the trial took the issue away from the jury by instructing it as to the state law. The determination of the applicable state law in a case such as this is a question for the court. *Cf. United States* v. *D'Amato,* 436 F.2d 52, 54 (3 Cir. 1970); *United States* v. *Lyon,* 397 F.2d 505, 513 (7 Cir. 1968), *cert. denied,* 393 U.S. 846 (1968). To receive testimony on the question of state law in the presence of the jury is unnecessary, but not prejudicial error unless the combination of the testimony and the court's instructions clearly leave the jury in confusion or in doubt as to the applicable state law. We do not find prejudicial error here.

Also cited as error is the trial court's comment that a certain question could be decided if one of the appellants took the stand.[63] This was not an infringment of appellant

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[63] "The Court: I understand what you are trying to show, but I don't know how you can show it by establishing—you are not able to establish the foundation for this document by this witness, as I see it. You may be able to establish it by some other witness, or if your brother takes the stand and testifies you can establish his whereabouts by his testimony.

"Mr. James Bellanca: Then I will withdraw it and save it until then, your Honor." Reporter's Transcript, Vol. 9, p. 1678.

Bellanca's right against self-incrimination. "[T] he test is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Knowles* v. *United States*, 224 F.2d 168, 170 (10 Cir. 1955).[64] No such finding could be reached here. It was an offhand comment which could have had no influence on the jury. This point is an example of a practice appellants have followed many times on this appeal: quoting out of context remarks of the prosecutor and especially the trial judge and supplying an "argument" for reversal by dramatic and hyperbolic language. Appellants argue that after this incident "appellant Bellanca had to take the stand or suffer the possibility of an untoward inference by the jurors." The episode in fact was a pedestrian exchange which, if anything, probably left the jury with the impression that appellants would be able to establish the point through other witnesses, including appellant Bellanca if he testified.

Appellants' next point is that the prosecution evaded a prior ruling by the court that it could not offer evidence of prior similar acts by appellants. The court, after hearing the proffered evidence in the absence of the jury, instructed the jury that there was no evidence of prior similar acts and that any comments of the prosecutor on the issue were to be disregarded. In addition, each juror was asked whether the comments had prejudiced them, and each juror said that he had not been prejudiced. The prosecution nevertheless subsequently inquired on cross-examination about prior attempts to invest in Las Vegas.

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[64] *See also United States* v. *Biondo*, 483 F.2d 635, 644-645 (8 Cir. 1973); *United States* v. *Mahanna*, 461 F.2d 1110, 1113--1115 (8 Cir. 1972); *United States* v. *Porter*, 441 F.2d 1204, 1216 (8 Cir. 1971), *cert. denied*, 404 U.S. 911 (1971); *Davis* v. *United States*, 357 F.2d 438, 440-441 (5 Cir. 1966), *cert. denied*, 385 U.S. 927 (1966).

This line of inquiry was permitted by the court for the limited purpose of showing Zerilli and Polizzi's earlier interest in investing in a Las Vegas casino. However, the probative value of that testimony was not great enough to justify its admission in light of the possibility of confusing the jury which in effect was asked to consider the evidence on one issue but not on another, although the issues of motive and prior similar acts, if not identical, were closely related. We do not find, however, that prejudice to appellants actually resulted in light of other and substantial evidence supporting the verdicts.

The government attempted to use a deposition of Benjamin Reisman, an attorney employed by appellant Emprise, on its redirect examination of Maurice Friedman. The deposition was taken in 1970, before appellants were indicted, during the course of other legal proceedings. Appellant Rooks was later asked on cross-examination by the prosecution whether he had heard the reading of the deposition and whether he knew of the events described in the deposition. On cross-examination of appellant Zerilli, the prosecutor used the deposition again in an attempt to refresh Zerilli's recollection.

The use of the deposition cannot be justified by Rule 15 of the Federal Rules of Criminal Procedure since it was not taken at the motion of a defendant, it was taken before the indictment and information here were filed, no order of the court had been obtained, and no notice had been given to the parties. The prosecution argues that it offered the evidence only as to the corporate defendant Emprise. The deposition was taken in connection with legal proceedings against Jeremy Jacobs, the President of Emprise. The court admitted it not on the authority of Rule 15, but rather on the ground that it was a prior statement of a witness in a case where the parties and issues were substantially the same as in the present case. We need not decide

whether there was error.[65] Another deposition of Reisman was taken and read into the record without objection, thereby curing any defect arising from the admission of the first deposition. Appellants' counsel had the opportunity to ask Reisman about his prior statements, thus fulfilling appellants' right to confront adverse witnesses.

If it were error to allow the prosecution to ask appellant Rooks about the first Reisman deposition, there was no possible prejudice.[66] The same is true of the use of the deposition as possibly refreshing Zerilli's memory; the incident was insignificant.[67]

The prosecution, as the representative of the government, is expected to follow high standards in conducting its case. "The United States Attorney is the representative not of

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[65] We disagree with the government's view that appellants' objection to admitting the deposition was withdrawn when it was agreed that another deposition of Reisman would be taken. The court had made its ruling, and defense counsel then asked about the possibility of taking another deposition.

[66] "Q Did you hear the reading of the Ben Reisman deposition that that happened in the spring?

"A No, I don't recall hearing that." Reporter's Transcript, Vol. 24, p. 4602.

[67] "Q Mr. Zerilli, does that refresh your recollection whether or not you went up to Emprise or Sportservice to speak with either Mr. Lou Jacobs or Ben Reisman about the Rooks and Kachinko loan, prior to April 4, 1966?

"A It does not refresh my recollection. I did not go to Buffalo and talk to them about the Alex Kachinko and Art Rooks loan.

"Q Do you recall the testimony, Mr. Zerilli, of Mr. Friedman during this trial indicating that you were there on that occasion?

"A I recall the testimony, yes.

"Q Are you saying that it was inaccurate and not true?

"A Yes, sir, much of it.

"Q How about this point, was it not true?

"A This point was not true, no, sir." Reporter's Transcript, Vol. 26, p. 5211.

an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). But during an extensive and fiercely contested trial, we cannot realistically expect perfection. *Cf. Lutwak* v. *United States*, 344 U.S. 604, 619 (1953). Upon hindsight, there were things said by the prosecution which would have been better unsaid. But nothing said or done deprived appellants of a fair trial.

The main instrument for insuring that the conduct of counsel does not deprive the accused of a fair trial is the trial judge. In this case the trial judge clearly did his best to give appellants a fair trial. *Compare United States* v. *Dellinger*, 472 F.2d 340, 385-391 (7 Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). Errors were committed, but none so prejudicial, so fatal, either individually or collectively, as to require reversal. "[F]ew, if any judges can altogether avoid words or action, inadvertent or otherwise, which seem inappropriate when later examined in the calm cloisters of the appellate court. But unless such misadventures so persistently pervade the trial or, considered individually or together, are of such magnitude that a courtroom climate unfair to the defendant is discernible from the cold record, the defendant is not sufficiently aggrieved to warrant a new trial." *Smith* v. *United States*, 305 F.2d 197, 205 (9 Cir. 1962), *cert. denied*, 371 U.S. 890 (1962). Appellants have failed to make a persuasive showing that their constitutional rights were violated, and our careful review of the entire record does not lead to a reasonable inference that the jury's verdicts were the end result of anything other than an impartial consideration of properly admitted evidence.

VIII. *Production of Jencks Act Statements*

Appellants claim that the prosecution's failure to produce four pretrial statements by its witness, Maurice Friedman, in conformance with the Jencks Act, 18 U.S.C. § 3500, requires a reversal. Two of the purported statements are interview memoranda prepared by an assistant United States Attorney; another is a report by an F.B.I. agent of one of the interviews; and the last is the transcript of a tape recording of a conversation between Friedman and one Dr. Victor Lands. The two interview memoranda and the "Lands transcript" were disclosed to appellants after Friedman's cross-examination had begun.

The two interview memoranda and the F.B.I. report are not Jencks Act statements. A written statement falls within that statute only if it is "made by said witness and signed or otherwise adopted or approved by him." 18 U.S.C. § 3500(e)(1). The record shows that Friedman had not signed, adopted, or approved these three written reports. The government attorney who wrote the memoranda took no notes during the interviews and testified that the memoranda were his summaries, conclusions, and interpretations of what Friedman had said. It does not appear that the F.B.I. report differs in these respects. The rationale of the Jencks Act is to provide the defense with material that could impeach a government witness. "We think it consistent with this legislative history, and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced." *Palermo* v. *United States*, 360 U.S. 343, 352-353 (1959). *See also Campbell* v. *United States*, 373 U.S. 487 (1963); *Rosenberg* v. *United States*, 360 U.S. 367, 369 (1959); *Wilke* v. *United States*, 422 F.2d 1298, 1299 (9 Cir. 1970).

The Lands transcript presents a more difficult question of construing the Jencks Act, a problem which we find unnecessary to resolve in this case.[68] Assuming for the purposes of argument that it should have been disclosed, we find that the untimely disclosure here was not prejudicial to appellants. Disclosures are required by the Jencks Act only for impeachment purposes.[69] *Palermo* v. *United States*, 360 U.S. 343, 345 (1959); *United States* v. *Harris*, 458 F.2d 670, 677 (5 Cir. 1972); *cert. denied*, 409 U.S. 888 (1972). The material in the Lands transcript could not have been used to impeach Friedman's testimony on direct examination. Though a question of inconsistency perhaps did arise with Friedman's testimony on cross-examination, appellants did then have the transcript. Indeed Friedman was questioned about it on recross-examination.[70] *Cf. United States* v. *Scaglione*, 446 F.2d 182, 184 (5 Cir. 1971), *cert. denied*, 404 U.S. 941 (1971). The prosecution is obligated to disclose to the defense statements falling within the Jencks Act regardless of anyone's perception of the utility of the statements for impeachment. But if, upon review, a failure to disclose appears clearly to be harmless and is not a willful avoidance and egregious dereliction of the prosecutor's statutory obligation, then a court need not invoke the drastic remedies of striking testimony or calling a mistrial as provided by 18 U.S.C. § 3500(d). *Cf. United States* v. *American Radi-*

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[68] Prior to 1970, the Lands transcript would clearly not have been within the Jencks Act. 18 U.S.C. § 3500(e)(2) then included only statements made "to an agent of the Government." The 1970 amendment eliminated that phrase, but the brief legislative history gives no hint of the Congressional intention behind the change. 2 U.S. Code Cong. & Admin. News 4017 (1970).

[69] Thus appellants' additional complaint of prejudicial surprise with respect to one of Friedman's answers on cross-examination, that he had told someone several years before of hidden interests in VFI, has no merit under the Jencks Act since that Act was not intended to protect against surprise but rather for impeachment purposes.

[70] See pages 49-53, *infra*.

ator & Stand. San. Corp., 433 F.2d 174, 203 (3 Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Pierce v. United States*, 414 F.2d 163, 169 (5 Cir. 1969), *cert. denied*, 396 U.S. 960 (1969).

IX. *The Lands Transcript*

The Lands transcript is a transcription of a tape-recorded conversation between Maurice Friedman and one Dr. Victor Lands in 1967. During that talk, Friedman said in reference to the attempt to secure a Nevada gambling license for VFI:

> "There are thirty two people who have invested three and a half million dollars coming before this Commission, all of whom have been approved at least by a majority of this three-man Board. I told you that we feel pretty good except that our lawyer is very, very nervous, and he understands through the grapevine that we are going to have one hell of a time—the thirty-two of us. The Mafia, Casa [*sic*] Nostra—everything's going to come out. This is a public hearing. The press will know."

On cross-examination Friedman testified that he had stated in 1967 that there were hidden interests in VFI. The court then ordered the prosecution to disclose the Lands transcript. With the jury absent, Friedman verified the accuracy of the transcript. He said that in using the terms "Mafia" and "Cosa Nostra" he was referring to appellants Zerilli and Polizzi. He also testified that he was referring to hidden interests in VFI when he said to Lands "everything's going to come out." Upon objection by the defense, the transcript was not admitted as evidence, but the court did permit testimony about the Lands conversation. The court, in an understandable effort to avoid any possible prejudice to appellants Zerilli and Polizzi, ordered Friedman not to use the terms "Mafia" and "Cosa Nostra" in his testimony before the jury. On redirect examination,

Friedman testified that he had mentioned to Lands that Zerilli and Polizzi held hidden interests in VFI. On recross-examination Friedman admitted that in the Lands conversation he had not used the words "hidden interests" nor referred specifically to any of appellants.

Although the trial court clearly had the best of motivations in its handling of the Lands transcript question, preventing prejudice to appellants from the use of the terms "Mafia" and "Cosa Nostra," it did commit error. Because of the vagueness of the terms used, the probative value of the Lands transcript in this case was insubstantial and was clearly outweighed by the possible prejudice arising from the terms "Mafia" and "Cosa Nostra" and, in an attempt to eliminate that possibility, by the danger of allowing testimony deviating from and therefore misrepresenting the actual terms used in the transcript. The court thus should not have admitted any testimony referring to the Lands transcript.

Appellants argue that they were seriously prejudiced by this error. They characterize this episode as a purposeful distortion of the Lands transcript, a falsification of the record, which resulted in the admission of testimony which is conclusively demonstrated to be false by the transcript itself and admitted to be false by the witness. We disagree. The trial court did not order Friedman to substitute "Zerilli" and "Polizzi" for "Mafia" and "Cosa Nostra." Friedman was instructed only not to use the latter terms. At most the witness may have misunderstood the court as suggesting such a substitution.[71] Moreover, the Lands tran-

[71] "The Court: Now, Mr. Friedman, it is my purpose to avoid your use of either of those terms ['Mafia' and 'Cosa Nostra'] in the hearing of the jury.

"Mr. Friedman: I understand, sir.

"The Court: Because of the possible prejudices that might result.

"The Witness: Yes, sir.

"The Court: Do you understand that you are not to use either

script did not contradict Friedman's testimony, as appellants argue. Nor did it confirm that testimony, as the government urges. The Lands transcript and Friedman's testimony were simply not expressly inconsistent. Friedman could, as he did in the absence of the jury, have commented on what he meant by some of the terms he had used in talking to Lands. If he had been permitted to say to the jury that, in using "Mafia" and "Cosa Nostra", he was referring to Zerilli and Polizzi, his testimony would clearly have had a strong impact on the jury adverse to appellants. As it was, his testimony was less precise on this point[72] and was heavily qualified on recross-examination.[73] In light of the substantial evidence in the record supporting appel-

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of those terms in any reference that you are called upon to make when referring to this document?

"The Witness: I understand, sir.

"The Court: Is there a manner that you can state names that you intended referring to at the time you were speaking in this document for those offensive words?

"The Witness: The gentlemen that I understood were Mr. Shapiro's associates, yes, sir." Reporter's Transcript, Vol. 10, pp. 1981-1982.

[72] "Q Isn't it a fact that you told Dr. Lands on that date that certain hidden interests in that casino were going to come out?

"A Words to that effect, yes, sir.

* * * * *

"Q When you used the phrase 'hidden interests,' talking to Dr. Lands, to whom did you refer?

"A To Mr. Shapiro's partners from Detroit.

"Q Who?

"A Mr. Zerilli and Mr. Polizzi." Reporter's Transcript, Vol. 19, p. 2000.

[73] "Q So that to put it right on the line, Mr. Friedman, you weren't trying to tell Dr. Lands that there was a hidden interest in the Frontier Hotel, were you?

"A No, I was trying to tell Dr. Lands why I was investigated in the Friars Club case.

"Q And you weren't trying to tell Dr. Lands, were you, that either Mr. Polizzi or Mr. Zerilli had any hidden interest in the Frontier Hotel, were you?

"A No, I wasn't.

lants' convictions, we do not find that the error in handling the Lands transcript was so prejudicial as to require reversal.

We find that, in light of all of the evidence of record, appellants also did not suffer prejudice from the government's argument to the jury concerning the Lands transcript, and that the court's response to the jury's request for a reading of the testimony about the Lands conversation was not an abuse of its discretion.[74] *United States* v. *Baxter*, 492 F.2d

"Q And, in fact, you did not mention hidden interest or Mr. Polizzi's name or Mr. Zerilli's name or Mr. Shapiro's name or any of those defendants' names in your conversation with Dr. Lands, is that correct?

"A No, I didn't sir.

"Q And you didn't intend to mention any of their names to Dr. Lands, did you?

"A No, sir." Reporter's Transcript, Vol. 10, p. 2036.

[74] The court did not deny the jury's request. The jury did not renew its request after the court gave its cautionary remarks:

"Before I agree to having it reread to you, I want to be certain that a rereading of any testimony is deemed important by the jury at this time to assist you in your deliberations. The reason for that is that we like very much to have you depend upon your own memory of the evidence and testimony in this case and not to have any testimony reread. We feel that to pick out certain portions of the testimony is very probably to unduly emphasize that testimony. At the same time I can conceive that a situation may have arisen during your deliberations that makes you feel rather compelled that the testimony on certain portions of the testimony ought to be reread to you, and if you feel that you would be assisted in your deliberations by a rereading of the testimony I will order that it be done.

"On the other hand, if you feel that you can continue with your deliberations successfully without a rereading of any of the testimony and depending upon your memory of it, I would prefer that, and I think counsel would too." Reporter's Transcript, Vol. 46, pp. 8963-8964.

Appellants' counsel also object to the implication arising from the court's statement that defense counsel concurred in the court's preference. That the court's comment could have had some profound impact on the jury is frivolous speculation.

150, 175 (9th Cir. 1973); *United States* v. *De Palma*, 414 F.2d 394, 396-397 (9 Cir. 1969), *cert. denied*, 396 U.S. 1046 (1970).

X. *Concealment of Prosecution Promises of Leniency*

Appellants contend that the prosecution failed to disclose its agreements with or promises of leniency to its key witness, Maurice Friedman, as required by *Giglio* v. *United States*, 405 U.S. 150 (1972). Friedman, serving prison sentences concurrently for three federal convictions, had his sentences modified after appellants' convictions and was released from prison. The prosecution did disclose a promise to Friedman that his testimony in this case would be called to the attention of the Parole Board, but maintained that no other promises were made. Appellants argue that the prosecution did also promise to urge the reduction of Friedman's sentences and stipulated that Friedman's motions for modification of sentence could remain submitted but undecided until after the trial in this case.[75] Appellants, however, do not argue that express agreements were reached, but rather that there was an implicit mutual

[75] Appellants contend that the federal judges who modified Friedman's sentences violated Rule 35 of the Federal Rules of Criminal Procedure. Appellants' position is unmeritorious. This Court, in a decision construing Rule 35 in its form prior to amendment in 1966, ruled that it required a motion for reduction to be made within 60 days and not final action on the motion within that time. *Loyras* v *United States*, 371 F.2d 714, 719 (9 Cir. 1967). The 1966 amendment increased the time limit to 120 days. There is authority for appellants' position that the 120-day limit also applies to judicial action. *Cf.* 8A J. Moore, Federal Practice ¶ 35.02[2], p. 35-6, n. 10.1 (2d ed. 1973). We do not feel, however, that the amendment necessitates a change in the *Loyras* ruling. *See Irizzary* v. *United States*, 58 F.R.D. 65, 67 (D.Mass 1972): "The 120 day period is technically not the time within which the motion may be made, but is rather the time within which the court may act. * * * However, as a matter of practice, the requirement has been interpreted to permit a court to act upon a motion as long as the motion is made within that period."

understanding that the prosecution would try to help Friedman.

Having reviewed the arguments and evidence presented by appellants on this point, we do not find that they establish undisclosed promises by the prosecution.[76] More importantly, however, even if undisclosed promises had been made, appellants would not have suffered prejudice as a result of the prosecution's dereliction.[77] The prosecution did disclose a promise to inform the Parole Board of Friedman's testimony. This disclosure alerted the defense and the jury to the possibility that the testimony was motivated by self-interest. *Cf. United States* v. *Sidman*, 470 F.2d 1158, 1165 (9 Cir. 1972).[78] The trial court then instructed the jury specifically on carefully weighing the testimony of "an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication."[79] Defense counsel did cross-

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[76] The evidence consists of the government's stipulations in continuing the motions for modification and the modifications after appellants' convictions, a statement during a post-trial hearing in this case by Assistant U.S. Attorney Nissen that he had told Friedman's attorney that Friedman's cooperation would be called to the attention of "the court or whatever appropriate authority it would be" (Reporter's Transcript, Vol. 51, p. 10,173), and the affidavit of Friedman's former custodian that Friedman had told him that the government had said that Friedman would be released after testifying in this case.

[77] Failure to disclose such promises will not require reversal unless it is reasonably likely that the jury's judgment would have been affected by disclosure. *Giglio* v. *United States*, 405 U.S. 150, 154 (1972); *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959).

[78] This point is not inconsistent with *Napue* v. *Illinois*, 360 U.S. 264, 268, 270-271 (1959). There the jury was told, contrary to fact, only that an unidentified lawyer from the public defender's office, not a state representative, had promised to help the witness. Here the prosecution disclosed that it would help the witness.

[79] See footnote 34, *supra*.

examine Friedman about his motive for testifying. Finally, the pending motions for modification of sentence were public records, available to the defense, and could have been the basis for cross-examining Friedman.

I concur in the portions of this opinion prepared by Judges Browning and Duniway.

BROWNING, Circuit Judge:

I concur in the portions of this opinion prepared by Judges Renfrew and Duniway.

XI. *Unitary Crime Contentions*

Appellants argue that "this case concerns a unitary event —the maintenance of Vegas Frontier Inc. from July 27, 1967 to November 27, 1967," and therefore conviction and punishment on a count charging conspiracy and several counts charging substantive offenses was improper.[1] The argument includes two propositions: that Congress did not intend to make conspiracy to violate 18 U.S.C. § 1952 a separate crime from the substantive offense; and that Congress did not intend to allow prosecution as a separate offense of each of several acts of travel where the illegal intent during each act related to the same unlawful activity. Neither proposition has merit.

A.

"The distinctiveness between a substantive offense and a conspiracy to commit it is a postulate of our law. 'It has

[1] The argument does not apply to Emprise Corporation, Rooks, or Giordano, who were each charged and convicted only of conspiracy. The other four defendants were each convicted and sentenced for conspiracy and more than one substantive count. The jail terms were concurrent, but separate fines were imposed on each defendant on the conspiracy count and at least one substantive count. Therefore, each of these defendants was affected adversely by the separate convictions, and the concurrent sentence doctrine is not applicable. *See* Benton v. Maryland, 395 U.S. 784 (1969); United States v. Tucker, 435 F.2d 1017 (9th Cir. 1970).

been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses.'" *Callanan v. United States*, 364 U.S. 587, 593 (1961), *quoting Pinkerton v. United States*, 328 U.S. 640, 643 (1946). Accordingly, unless there is specific language to the contrary, Congress presumably intended to permit punishment as separate offenses of both the substantive crime and a conspiracy to commit it. 364 U.S. at 594-95. There is no such language here, in either the statute [2] or legislative history.[3]

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[2] *See* pages 5-6 *supra* for a discussion of the statute.

[3] There is no constitutional bar to separate convictions and sentences for the substantive offenses defined by § 1952 and for conspiracy to commit that offense. Nolan v. United States, 423 F.2d 1031, 1047-48 (10th Cir. 1970). "Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy." Pereira v. United States, 347 U.S. 1, 11 (1954). An agreement or common course of conduct among two or more persons is not an essential element of the substantive offense under § 1952: The travel required by § 1952(a) might be accomplished by only one person, and the "business enterprise" required by § 1952(b)(1) also might be conducted by an individual. True, both the legislative history (*see* United States v. Roselli, 432 F.2d 879, 886 n.8 (9th Cir. 1970)), and case law (*see, e.g.*, United States v. Donaway, 447 F.2d 940, 944 (9th Cir. 1971) indicate that § 1952 is not directed against casual and isolated instances of illegal conduct. But neither suggest that the substantive crime requires the participation of a group of people.

Further, the conspiracy alleged here is not merely an agreement to violate state law but an agreement to travel interstate with the intent to promote certain violations of state law. It is distinct from the joint activity that might be involved in running the business enterprise mentioned in § 1952 even if the "business enterprise" language were construed to require more than a sole proprietorship.

Nor is there any constitutional bar to conviction for both conspiracy and 18 U.S.C. § 2, the aiding and abetting statute underlying the conviction of some of the defendants on some of the substantive counts. United States v. Valencia, — F.2d —, — (9th Cir. Feb. 1, 1974); Pereira v. United States, 347 U.S. 1, 11-12 (1954).

B.

Turning to the second proposition, the language of the statute seems unambiguous. The offense defined is an act of travel or use of an interstate facility, with the requisite intent, plus subsequent performance of another act of the kind specified in the statute. Appellants argue, however, that the legislative history indicates that section 1952 was directed at a "course of conduct," and therefore various acts of travel in furtherance of a single "unlawful activity," 18 U.S.C. § 1952(b), should be held to constitute only one crime. But "the 'course of conduct' referred to in the . . . legislative history of Section 1952 refers to the nature of the business promoted or facilitated—and not to the essence of the federal offense, which is 'travel.'" *United States* v. *Teemer*, 214 F. Supp. 952, 958 (N.D. W.Va. 1963),[4] *quoted with approval* in *Katz* v. *United States*, 369 F.2d 130, 135 (9th Cir. 1966).

No appellate court appears to have discussed the proper unit of prosecution under section 1952,[5] but similar federal

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[4] Judge Paul continued, 214 F. Supp. at 958:

> The phrase seems to refer to the fact that the Act was designed to attack an entrenched operation rather than a sporadic poker game or a floating crap game. No act of travel is to be deemed unlawful unless the enterprise is a continuing one; but once the continuity of the enterprise is established, any act of travel, with the requisite intent and the subsequent participation, would seem to be a separate offense, even if the travel is a daily or regular event, and thus, perhaps, a "continuing" activity. If this is the plain and literal meaning of the Act, it is within the power of Congress to make each act of travel a unit of prosecution. See, e.g., Mitchell v. United States, 142 F.2d 480 (10 Cir., 1944); and this, in spite of the distinguishable cases of United States v. Universal CIT Credit Corp., 344 U.S. 218, 73 S.Ct. 227, 97 L.Ed. 260 (1952) and Bell v. United States, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955).

[5] Separate convictions and sentences for individual acts of travel in violation of 18 U.S.C. § 1952 have been affirmed without discussion of the issue raised here. *See, e.g., United States* v. *McGowan*, 423 F.2d 413, 416 (4th Cir. 1970).

statutes making it a crime to use interstate transportation or communications facilities in aid of illegal purposes have been construed to permit prosecution of each use of such facilities as a separate offense. *See, e.g., Sanders* v. *United States*, 415 F.2d 621, 626-27 (5th Cir. 1969); *Katz* v. *United States*, *supra*; *Mitchell* v. *United States*, 142 F.2d 480 (10th Cir. 1944). The cases upon which appellants rely (*Braverman* v. *United States*, 317 U.S. 49 (1942); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952); *Bell* v. *United States*, 349 U.S. 81 (1955); and *Rewis* v. *United States*, 401 U.S. 808 (1971)) are inapposite.[6]

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[6] The issue in *Braverman* was whether a single agreement to commit several criminal acts constituted one or several conspiracies. In the present case only one conspiracy was charged. *Bell* held that a single act of transporting two women interstate at the same time was one violation of the Mann Act. In the instant case, each substantive charge involved a separate act of travel on a different day. There was no attempt to carve several offenses out of a single transaction.

Universal C.I.T. is somewhat closer on its facts. As the Court pointed out, however, there was specific evidence in the legislative history of the Fair Labor Standards Act that Congress did not intend each breach of the statutory duty with respect to minimum wages and overtime owed to each employee during each work week to be treated as a separate crime. 344 U.S. at 222-24. Also, the language of the Act was ambiguous as to the proper unit of prosecution. If not construed to limit prosecution to an entire course of conduct no limit at all was imposed on the number of crimes that could be charged. Here, the statute is unambiguous; it is explicitly directed at acts of travel and use of interstate facilities, and the prosecution can charge only as many separate crimes as there were separate acts of travel or use in interstate facilities. Where the command of the statute as to the unit of the offense is clear, there is no room for application of the so-called "rule of lenity" of the *Bell* case. *See* Callanan v. United States, 364 U.S. 587, 596 (1961). It is true, as appellants point out, that the Supreme Court applied the "rule of lenity" to § 1952 in support of the ruling in *Rewis*, 401 U.S. at 812, that interstate travel by patrons of a gambling establishment did not violate the Act. But the Court premised this application upon a determination that there was an ambiguity in the language of § 1952 relating to persons covered. 401 U.S. at 811. There is no such ambiguity with respect to the unit of the offense.

In view of the plain import of the language of section 1952, the absence of any contrary indication in the legislative history,[7] and the construction given comparable statutes over the years, we conclude that each act of travel may be treated as a separate violation of section 1952.

XII. *Venue*

Appellants raise two venue-related claims. They contend venue was improperly laid in the Central District of California as to some of the substantive counts.[8] They also contend the trial court abused its discretion by denying motions under Federal Rule of Criminal Procedure 21(b) to transfer the proceedings to Detroit or Las Vegas.

A.

Appellants argue venue was improperly laid as to certain substantive counts for two reasons. First, relying on *United States* v. *Bozza*, 365 F.2d 206 (2d Cir. 1966), they argue that the act of carrying on, or distributing the proceeds of, unlawful activity, required to complete an offense under section 1952, did not occur in the Central District of California, though travel with the requisite intent did. Second, they argue that some of the defendants in each count were charged not with themselves traveling but with aiding and abetting the travel of others. Again, appellants

[7] Congress may well have concluded there was a separate social interest in deterring each act of travel in furtherance of an illegal enterprise: each successive trip may increase the success of the illegal activity, and a decision not to make a given trip for fear of additional penal consequences could therefore limit the harm to society § 1952 is intended to prevent. *Cf. Irby* v. *United States*, 390 F.2d 432, 434 (D.C. Cir. 1967) (en banc).

[8] Appellants do not attack venue on the conspiracy count. "[A]n overt act committed in the course of a conspiracy which occurs in a district gives rise to jurisdiction to prosecute the conspirators in that district." United States v. Barnard, 490 F.2d 907, 910 (9th Cir. 1973). Several consequential overt acts are alleged to have occurred in the Central District of California.

rely on *Bozza:* "Congress seems to have been content with venue where the defendants' own accessorial acts were committed or where the crime occurred, without providing still another where the accessorial acts of agents took place." 365 F.2d at 221.

But in *Bozza*, the offense related to the offense of receiving stolen stamps. As the *Bozza* court pointed out, this is not "a continuing offense which is 'held, for venue purposes to have been committed wherever the wrongdoer roamed' . . . ," (*quoting Travis* v. *United States,* 364 U.S. 631, 634 (1961)) but rather is a " 'single act which occurs at one time and at one place in which only it may be tried, although preparation for its commission may take place elsewhere' " (*quoting Reass* v. *United States,* 99 F.2d 752, 754 (4th Cir. 1938)). 365 F.2d at 220.

In contrast, the offense under section 1952 is one "involving . . . transportation in interstate . . . commerce," which, by express provision of the general venue statute, "is a continuing offense and . . . may be . . . prosecuted in any district from, through, or into which such commerce . . . moves." 18 U.S.C. § 3237(a). *See United States* v. *Guinn,* 454 F.2d 29, 33 (5th Cir. 1972); *cf. United States* v. *Barnard,* 490 F.2d 907, 911 (9th Cir. 1973).

Thus, a defendant can be prosecuted for traveling in violation of section 1952, or for aiding and abetting such travel, in any district in which the travel occurred.

B.

Whether the proceedings should have been transferred is an entirely separate question. Rule 21(b), Federal Rules of Criminal Procedure, permits transfers "[f]or the convenience of parties and witnesses, and in the interest of justice." Since the decision as to whether to grant such a transfer "must largely rest in the sound judicial discretion of the trial judge," *Wagner* v. *United States,* 416 F.2d 558, 562 (9th Cir. 1969), our review is limited to whether that discretion was abused. We conclude it was not.

Appellants' first motion requested a transfer to Detroit; Las Vegas was also mentioned as a proper venue for trial, but the motion did not request transfer there. In support of their motion, appellants pointed out that most of the appellants and many of the anticipated defense witnesses lived in the Detroit area, and that much of the conduct relevant to the charges occurred there. But relevant conduct had occurred in many places, including the Los Angeles area and nearby Las Vegas, where the business enterprise that defendants allegedly sought to control was located. Nevada law was important to the case, as appellants argued. The relevance of this circumstance is obscure; in any event, it scarcely favored trial in Detroit as against Los Angeles. Both government and defense witnesses were widely dispersed, but 10 of the 31 persons on the government's list of anticipated witnesses resided in the Los Angeles area. The criminal calendar in the federal district court in Detroit was seriously delayed; the Los Angeles calendar, on the other hand, would permit the early trial for which appellants had repeatedly called. This consideration, admittedly relevant, *see Platt* v. *Minnesota Mining & Manufacturing Company*, 376 U.S. 240, 243-44 (1964), appears to have swung the balance.

On the basis of the information before the trial court, the decision on the first motion seems entirely reasonable. Appellants' residence was a factor to be considered, but was not controlling. *Platt* v. *Minnesota Mining & Manufacturing Company*, *supra*, 376 U.S. at 245-46; *Jones* v. *Gasch*, 404 F.2d 1231, 1240 n.43 (D.C. Cir. 1967). The considerations for and against a transfer seemed fairly balanced, or at least not so clearly weighted against Los Angeles as the trial forum as to overcome the substantial interest in avoiding the delay that would have followed transfer to Detroit's congested calendar.

Appellants' main argument is not that the court abused its discretion in the balance it struck on the facts before it on the first motion. Rather, appellants assert that "the

prosecution misrepresented to the court that numerous of its witnesses would be Los Angeles area residents, and that Detroit witnesses desired by appellants would be called by the prosecution itself, thereby obviating some of the prejudice to the defense of a distant trial."

The trial judge was under no misapprehension regarding the Detroit witnesses when he ruled against the initial motion to transfer; the government had advised the court it did not intend to call more than one or two witnesses from Detroit. It is true that many of the Los Angeles witnesses on the government's first list disappeared from the second list, filed several months later. But it is hardly surprising that the prosecution's plans with respect to witnesses changed in the course of preparing this complex case for trial, particularly since government counsel who prepared the first list had been replaced by new government counsel.[9] Appellants' forecasts regarding the number and residence of their witnesses turned out to be no more reliable than the government's.

Several months after denial of the initial transfer motion, both sides filed new witness lists. The prosecution dropped most of its Los Angeles witnesses and added a number from Las Vegas. The defense renewed its motion for change of venue, this time pressing for transfer to Las Vegas. It

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[9] A situation could arise where the prosecution's representations to the judge were so far from the mark that they could only be treated as submitted in bad faith to improperly prevent a change of venue. In such a situation, we would look beyond the information presented to the trial judge in determining whether denial of transfer was within the judge's discretion, since the trial judge has a responsibility to pierce the prosecution's representations and assure that they are made in good faith. And, if the transfer were initially denied on the basis of prosecution information later shown to have been submitted in bad faith, the trial judge would be obligated to view a renewed motion as if it were an original one, without requiring the especially strong showing that may be required to support a late motion. *See* note 10 *infra*.

appeared, however, that the condition of the criminal docket in Las Vegas was such that a reasonably speedy trial could not be obtained, whereas trial in Los Angeles was imminent. The trial court denied the renewed motion both on this ground and because the witnesses then expected to be called resided throughout the country.

This was not an abuse of discretion. It is proper to require a greater showing of inconvenience when a change of venue is sought late in proceedings.[19] As the trial court observed, there was no "ideal place for the holding of this trial." Wherever the trial was held, both sides would bear significant transportation and lodging expenses. Moreover, most of the Las Vegas witnesses were government witnesses; since the government appeared willing to pay the expense of transporting them, it is hard to see how defendants would be more inconvenienced by trial in Los Angeles than in Las Vegas. The improbability of a speedy trial in Las Vegas was a factor entitled to great weight, especially since one defendant had already moved for dismissal on speedy trial grounds.

The motion for change of venue was renewed a third time, after yet another set of witness lists was filed. The trial judge reiterated his belief that only compelling reasons could justify transfer when trial was imminent. For the reasons stated, this final denial was not an abuse of discretion.

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[19] Rule 22, Fed. R. Crim. Pr., provides that "[a] motion to transfer under these rules may be made at or before arraignment or at such other times as the court or these rules may prescribe," suggesting that the court may decline to entertain a late motion. *See* United States v. Tremont, 351 F.2d 144, 146 (6th Cir. 1965); Cagnina v. United States, 223 F.2d 149, 154 (5th Cir. 1955). Here, there has been a change in the situation since the initial venue decision. Nonetheless, to avoid the obvious opportunity for abuse it was proper to require a greater showing of inconvenience when trial was imminent.

XIII. *Giordano's Severance Motions*

Appellant Giordano complains that the trial court abused its discretion in denying his motions for severance under Rule 14, Federal Rules of Criminal Procedure, submitted both before and during trial.

Denial of Giordano's pretrial severance motion was clearly correct. Although Giordano was indicted on only one count, that count charged conspiracy. For obvious reasons, a joint trial is particularly appropriate where conspiracy is charged. *Davenport* v. *United States*, 260 F.2d 591, 594 (9th Cir. 1958). *See* American Bar Association, Standards Related to Joinder and Severance 39 (Approved Draft 1968).

The government represented that Giordano was among the "leaders" in the unlawful scheme and furnished the court with a summary of the evidence it expected to offer linking Giordano to the conspiracy. Moreover, the government stated that a separate trial would be substantially as long as a joint one, since a full exposition of the entire scheme was necessary to establish the significance of Giordano's separate conduct. On this record the advantages and economy of a joint trial clearly outweighed the remote possibility of unwarranted prejudice. *See United States* v. *Donaway*, 447 F.2d 940, 943 (9th Cir. 1971).

The balance may not have been so clear when Giordano moved for severance during trial. Although there is no suggestion of bad faith, the evidence against Giordano did not entirely justify government counsel's optimistic forecast. Nonetheless, there was sufficient evidence other than acts and statements of co-conspirators to show that Giordano participated in the conspiracy. Since this is so, it is difficult to understand how Giordano could have benefited from severance, for evidence of the acts and statements of the other defendants pursuant to and in furtherance of the conspiracy would have been admissible against Giordano

if tried alone.[11] *United States* v. *Kenny*, 462 F.2d 1205, 1218 (3d Cir. 1972); *see also United States* v. *Roselli*, 432 F.2d 879, 901 (9th Cir. 1970). Moreover, as the government asserted, all or substantially all such evidence probably would have been introduced in a separate trial. It is possible that the government might have considered the time and effort required for a separate trial too great a price to pay for the conviction of Giordano alone, but loss of that possibility hardly demonstrates that Giordano was "prejudiced by a joinder" within the meaning of Rule 14.

The trial judge took great pains to protect Giordano's right to an independent evaluation by the jury of the evidence against him. Twice during voir dire the court admonished the jury that each defendant—naming them, including Giordano—was entitled to be judged as an individual. No less than six times during instructions to the jury the court stressed the importance of separate determinations of each defendant's guilt or innocence on the basis of

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[11] Giordano stresses the fact that a very small proportion of the trial transcript relates directly to him; the government engages in elaborate analyses which, it claims, show that Giordano was not as peripheral to the proceedings as he claims. We do not consider, however, that the exact quantity of evidence relating to a conspiracy defendant personally is important in determining whether severance should have been granted. Although there are some cases which take this factor into account (*see* United States v. Branker, 395 F.2d 881, 888 (2d Cir. 1968); United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971)), they concern defendants against whom conspiracy charges were dismissed during trial. Dismissal of a conspiracy charge does not mean that severance is required. Schaffer v. United States, 362 U.S. 511, 516 (1960). It does, however, shift the balance of factors to be considered, *see Schaffer*, *supra*; a separate trial would not entail a replay of the joint conspiracy trial, and much of the evidence admitted in the joint trial could not be considered against the defendant no longer charged with conspiracy. In the instant case, most of the evidence not directed to Giordano personally was nonetheless admissible against him, so that the proportion of personally oriented evidence is not important.

the evidence pertaining to the particular defendant. Several times the court warned that association with participants in a conspiracy does not prove that a defendant was a member of the conspiracy. This jury's ability and determination to make discriminating judgments is evidenced by the fact that it did not convict one of the most active participants in the conspiracy, defendant Polizzi, on one of the nine substantive counts on which he was charged. Obviously, this jury did not render a mass judgment. *United States* v. *Berlin*, 472 F.2d 13, 15 (9th Cir. 1973). There may be cases in which even careful jury instructions cannot cure the possibility of prejudice by association inherent in conspiracy trials,[12] but this was not one of them.

Giving due recognition to the somewhat stricter showing required to justify severance when the trial has been partially or wholly completed,[13] we conclude that Giordano's motions for severance during trial were properly denied.

XIV. *Giordano's Requested Instruction*

Giordano rested at the close of the government's case-in-chief. He asked for a jury instruction that no evidence introduced thereafter could be considered against him. The request was denied. Giordano's co-defendants then testified in their own defense. In arguing the case to the jury, the government drew implications from this testimony adverse to Giordano.

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[12] *See* Krulewitch v. United States, 336 U.S. 440, 454 (1949) (Jackson, J., concurring); United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971). *But see* United States v. Cozzetti, 441 F.2d 344, 349 (9th Cir. 1971); United States v. Patterson 455 F.2d 264, 266-67 (9th Cir. 1971); United States v. Roselli 432 F.2d 879, 902 (9th Cir. 1970), all holding that careful jury instructions can be sufficient to guard against this kind of possible prejudice from joinder.

[13] ABA, *Standards Relating to Joinder and Severance* 33 (Approved Draft 1968).

Giordano's decision not to offer evidence in his own behalf preserved his right to a review of the denial of his motion for acquittal on the basis of the government's evidence alone. *See United States* v. *Figueroa-Paz*, 468 F.2d 1055, 1058 (9th Cir. 1972). But this is not to say, if denial of the motion to acquit was proper, that the jury was not entitled to consider *all* of the evidence, including that presented by Giordano's co-defendants, in determining Giordano's guilt.

Evidence offered in defense in the trial of a single defendant is available for all purposes, and the rule is the same in a joint trial of multiple defendants—evidence offered by one may support the conviction of the others. *See Rickey* v. *United States*, 242 F.2d 583, 586 (5th Cir. 1957); *Maupin* v. *United States*, 225 F.2d 680, 682 (10th Cir. 1955). This court has held that the same rule is applicable even to a defendant who has rested at the close of the government's case, and an instruction of the kind sought by Giordano is therefore properly refused. *Brown* v. *United States*, 56 F.2d 997, 999-1000 (9th Cir. 1932).[14]

There is a substantial reason for the rule. One purpose of a joint trial of defendants allegedly involved in a single scheme is to facilitate evaluation by the jury of the evidence against each defendant in light of the entire course of conduct. "Such procedure not only increases the speed and efficiency of the administration of justice but also serves to give the jury a complete over-all view of the whole scheme and helps them to see how each piece fits into the pattern." *Rakes* v. *United States*, 169 F.2d 739, 744 (4th Cir. 1948).

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[14] Giordano cites one instance in which the instruction he requests was given, United States v. Schneiderman, 106 F. Supp. 906, 928 (S.D. Calif. 1952), but there was no discussion in *Schneiderman* of the issue. *See also* United States v. Interstate Engineering Corp., 288 F. Supp. 402, 413-14 (D. N.H. 1967); Devitt & Blackmar, Federal Jury Instructions § 10.06 (1970). *But see* United States v. Zambrano, 421 F.2d 761, 763 (3d Cir. 1970), supporting the *Brown* holding by necessary implication.

See ABA Standards Relating to Joinder and Severance 39 (Approved Draft 1968). This purpose of joinder would be frustrated as to a particular defendant if he could bar consideration as to him of some of the relevant evidence by resting before that evidence was introduced.

As we emphasized in *Brown*, a defendant who rests his case may nonetheless cross-examine or introduce evidence to impeach or contradict a co-defendant who testifies thereafter. *See also United States* v. *Zambrano*, 421 F.2d 761, 763 (3d Cir. 1970). In the present case, as in *Brown*, there was no request to cross-examine the co-defendants or to admit rebuttal evidence. It is even clearer here than in *Brown* that "if such request had been made, it would have been granted," 56 F.2d 1000, since the trial judge asked Giordano's attorney after each defense witness whether he had any questions to ask by way of cross-examination.[15]

XV. *Sufficiency of the Evidence—Giordano*

We consider Giordano's contention that the evidence was insufficient as to him separately from the same contention as to other defendants. The case against Giordano was the weakest; and, unlike other defendants, Giordano did not waive his right to review of the motion to acquit made at the close of the government's case. For the latter reason, we consider only the evidence produced against Giordano in the prosecution's case-in-chief.

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[15] Because Giordano neither cross-examined his co-defendants nor offered rebuttal evidence, we are not faced, either here or in the next section of this opinion dealing with Giordano's motion for acquittal, with the problem presented in Cephus v. United States, 324 F.2d 893, 897-98 (D.C. Cir. 1963). In *Cephus*, the issue was whether a defendant waives his right to test the government's case-in-chief on appeal if he offers evidence only to counter a co-defendant's incriminating evidence; the Court of Appeals for the District of Columbia held that there is no waiver. This court has never squarely accepted or rejected the Cephus rule. *See* United States v. Figueroa-Paz, 468 F.2d 1055, 1058 (9th Cir. 1972); Verdugo v. United States, 402 F.2d 599, 604 n. 4 (9th Cir. 1968).

As Giordano points out, the government offered no direct evidence of his participation in the conspiracy.[16] But "circumstantial evidence is not inherently less probative than direct evidence," *United States* v. *Nelson*, 419 F.2d 1237, 1239 (9th Cir. 1969), and, in many conspiracy cases, is the only kind of evidence available. *White* v. *United States*, 394 F.2d 49, 51 (9th Cir. 1968). Thus, denial of the motion to acquit is subject to the same standard on review as it would be if there were direct evidence of guilt: whether "jurors reasonably could decide that they would not hesitate to act in their own serious affairs upon factual assumptions as probable as the conclusion" that Giordano participated in the conspiracy. *United States* v. *Nelson, supra*, 419 F.2d at 1245.

The government's theory was that at Zerilli's solicitation Giordano arranged for the investment of $150,000 in VFI when the enterprise was in critical need of funds; that the investment was made through Sansone, a St. Louis real estate investor and bank director, acting as a "front"; and that following the investment Giordano participated at various critical stages in the illegal enterprise.

Some of the government's circumstantial evidence is described briefly in the margin.[17] Possibly the series of events

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[16] Friedman, a co-conspirator who testified for the government, and Feil, another witness who testified directly to the illegal involvement of some defendants, offered no evidence implicating Giordano; none of the four government witnesses who might, on the prosecution's theory, have known of Giordano's involvement in the conspiracy, directly implicated him.

[17] Giordano and Zerilli were close friends. Giordano lived in St. Louis, Zerilli in Detroit. There were telephone calls between Giordano's home and office and Zerilli's, as well as other calls charged to Zerilli's credit card and placed to Giordano's numbers, at various key times in the course of events between June and November, 1967. Giordano knew the Cusumanos and the Sansones in St. Louis. The Sansones did not know Zerilli.

The need for additional money, which resulted in the issuance of the Class C debentures Sansone later bought, developed in early

disclosed by the evidence could be explained as coincidence, or as normal contacts among friends. On the other hand, "[t]he jury undoubtedly could have found these events too interlocked to constitute coincidence" (*United States* v. *White*, *supra*, 394 F.2d at 53); it could have drawn from the events the inferences suggested by the prosecution—that Giordano was brought into the conspiracy at least as early as June; that he arranged for the investment of $150,000 in VFI through Sansone; and that the purpose of Giordano's five trips to Las Vegas in 1967 was to watch over this hidden interest in VFI and participate in various key decisions. There comes a point when the innocent explanation is so much less likely than the culpable one that jurors properly could decide that a defendant in fact was acting in furtherance of the conspiracy and shared its illegal purpose. We believe that point was reached here as to Giordano.

June. There were calls between telephones listed to Giordano and Zerilli at that time. Zerilli came to St. Louis for two days on June 8.

The Sansones began gathering money for their VFI investment after Zerilli visited St. Louis, but before the Class C debentures in which they invested were officially issued. They could have learned about the investment possibility only from a person having knowledge of the inner operations of VFI.

In early August, Giordano repaid an overdue loan to the Cusumano family trust. Less than three weeks later, Sansone took out a loan from the same trust. This loan was part of the money Sansone eventually invested in VFI. The Sansone loan was the only business transaction ever consummated between Sansone and the Cusumano family. It was unsecured. Although the VFI debentures in which Sansone invested yielded 4% interest, the loan from Cusumano was at 7%, an anomaly for which Sansone had no convincing explanation.

The Sansone investment was withdrawn less than 60 days after it was made, after Sansone was told by the Nevada Gaming Commission that he would have to apply for a gaming license, disclose the source of the invested funds, and provide fingerprints. Sansone testified that he withdrew only because, "I never anticipated that I would have to be classified as a gambler when I bought the

Three legal arguments subsidiary to Giordano's challenge to the sufficiency of the evidence should be mentioned.

1. The government called Cusumano and Sansone as witnesses. Both denied that Giordano was involved in a Cusumano loan to Sansone. Giordano argues that the government is bound by this testimony. But the notion that a party is bound by the testimony of every witness it calls is "long discredited," *Rodgers* v. *United States*, 402 F.2d 830, 833 (9th Cir. 1968), and is clearly not the law of this circuit. *See* cases cited in *Rodgers*, 402 F.2d at 833, n. 1.

Rodgers does hold that the government cannot rely on an inference when the *only* evidence presented by the government is inconsistent with the inference the government

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debenture." But from the outset the Sansones admittedly knew they were investing in a gambling casino.

Giordano made five trips to Las Vegas between July and November 1967. The Giordanos have no business interests or relatives in Las Vegas, and Giordano was not a gambler. Each of these trips was closely preceded, or followed, or both, by telephone contact between Giordano telephones and Zerilli telephones or phone calls charged to Zerilli. Each trip coincided with an important event in the unlawful scheme. For example, trips in September and November coincided with the beginning and end of the $150,000 investment.

On September 12 there was a series of phone calls between Zerilli's home and Giordano's home and business. The next day, Sansone marshaled the entire $150,000. On that same day there was a call from a Zerilli telephone to Giordano's telephone. On September 14 Sansone flew to Las Vegas with the money to make the investment. He checked into the Frontier Hotel. Sixteen minutes later, Giordano checked into the Dunes Hotel. Four days later, Sansone deposited the $150,000 in VFI's account, received the debentures, and left Las Vegas. Giordano departed the following day. In November, a telephone call to Giordano was charged to Zerilli on the same day the Nevada Gaming Commission's letter was sent to Sansone. Giordano went to Las Vegas on November 9; Zerilli arrived and checked into the Frontier Hotel under an assumed name on November 10; and Sansone arrived on November 11 to complete the withdrawal of the $150,000 investment.

wishes drawn. However, *Rodgers* itself acknowledges that this does not "mean that in every case where some of the government's evidence is arguably contrary to an inference that it wishes to have the jury draw from other evidence, the inference may not be drawn." 402 F.2d at 834. *See also United States* v. *Payne*, 467 F.2d 828, 831 (5th Cir. 1972). Further, in *Rodgers* the evidence inconsistent with the desired inference was presented by a disinterested witness and was embodied in an uncontested document. Here, Cusumano and Sansone were interested witnesses with motives to dissemble about Giordano's role, and the prosecution presented a great deal of other evidence, albeit circumstantial, connecting Giordano with the loan. It may be reasonable to require the prosecution to do more than rely on a general inference to counteract its own uncontested documentary evidence, but an inference specifically supported by other evidence is not barred simply because it is inconsistent with testimony of witnesses who were called by the government but have every reason to protect the defense.

2. Giordano argues that telephone company records showing calls between telephone numbers assigned to Giordano and Zerilli were inadmissible because there was no direct evidence as to who participated or what was said, citing *Laughlin* v. *United States*, 226 F. Supp. 112, 113 (D.D.C. 1964). But this case held only that such records were insufficient corroboration in a perjury case, where "direct and positive evidence of falsity of defendant's sworn statement" is required, and "circumstantial evidence thereof is insufficient, no matter how persuasive." 226 F. Supp. at 114. The Court of Appeals held such records admissible in a conspiracy case, distinguishing the district court's ruling in the earlier perjury case because of the high degree of corroboration necessary in a perjury case. *Laughlin* v. *United States*, 385 F.2d 287, 293 (D.C. Cir. 1967).[18]

[18] In the conspiracy case, there was evidence identifying the parties to the telephone calls (*see* 385 F.2d at 293), but the Court of Appeals did not rest admissibility upon this circumstance.

Giordano also contends the government cannot rely upon inference to establish the contents of the telephone calls, citing *Osborne* v. *United States,* 371 F.2d 913, 927-29 (9th Cir. 1967). But in *Osborne,* each telephone call was the subject of a separate count charging a separate violation of 18 U.S.C. § 1343, "Fraud by wire, radio, or television." Proof of the contents of the particular telephone call was therefore crucial to conviction on the particular count. In the present case, the exact content of each telephone call is not crucial to conviction; the telephone calls themselves are not the subject of the charge. Proof of their occurrence, especially their timing and frequency, is merely circumstantial evidence tending, with other circumstantial evidence, to show Giordano's participation in the conspiracy.

3. Giordano makes the same contention with respect to proof regarding his trips to Las Vegas—that no inference can be drawn from the fact that they occurred—and we reject it for the same reasons. He also argues that hotel records evidencing his stays at the Dunes Hotel in Las Vegas in 1967 should not have been admitted because other contemporaneous hotel records were destroyed "in accordance with routine hotel policy" prior to the return of the indictment in 1971. The argument is that if the indictment had been returned earlier the records might have been in existence and might have contained exculpatory or explanatory evidence demonstrating that Giordano's visit had an innocent purpose. Giordano cites *United States* v. *Marion,* 404 U.S. 307 (1971).

The contention is frivolous. The Sixth Amendment does not apply to pre-indictment delay, 404 U.S. at 313, and Giordano has not shown that the delay involved here violated the Due Process Clause. 404 U.S. at 324-26. We need not consider, therefore, whether suppression of evidence would be a proper remedy if a due process violation had occurred. *Cf. Strunk* v. *United States,* 412 U.S. 434 (1973).

DUNIWAY, Circuit Judge:

I concur in the portions of this opinion prepared by Judges Renfrew and Browning.

XVI. *Criminal Liability of Emprise Corporation.*

Appellant Emprise Corporation argues that it is not liable for any criminal acts committed by its predecessor in interest. The facts are these: Before March 1, 1970, there was a New York corporation called High Park Corporation, which owned all of the shares of another New York corporation, Emprise Corporation (Old Emprise). On March 1, 1970, Old Emprise merged into its parent, High Park Corporation. On March 17, 1970, High Park Corporation amended its corporate name to Emprise Corporation (New Emprise).

The February 26, 1971, indictment in this case charged "Emprise Corporation" as a defendant. In July, 1971, it became clear that this meant Old Emprise, and, on September 9, 1971, the district court dismissed as to Old Emprise for want of personal jurisdiction over it. The government filed an information against New Emprise. New Emprise moved to dismiss, but this motion was denied, and New Emprise was convicted of violating 18 U.S.C §§ 371 and 1952 and was fined $10,000. The charged offense was committed by Old Emprise, before the merger.

The question is whether the surviving corporation of a merger, here New Emprise, can be held criminally liable for acts committed by a former subsidiary constituent corporation (Old Emprise) which later merged into the survivor.

Appellants argue that in this federal case we must apply federal law, regardless of what the state law may be, and that under federal law only the constituent corporation, not the surviving corporation, can be prosecuted. Of course we apply federal law. That, however, does not answer the question. Federal courts, in deciding federal cases, often

borrow otherwise applicable state law as the federal law to be applied in a federal case when doing so is reasonable and there is no contrary federal policy. Here, Old Emprise and New Emprise are New York corporations. We can think of no federal policy that would prohibit our borrowing New York law in deciding whether New Emprise is liable for a crime committed by Old Emprise. Neither can appellants, beyond mere assertion.

Under the Constitution, the federal government is not expressly granted the power to form corporations; it may do so only under the necessary and proper clause.[1] *See, e.g., McCulloch* v. *Maryland*, 1819, 17 U.S. (4 Wheat.) 316. The result is that nearly all corporations in the United States are creatures of state law. This also means that when Federal statutes refer to "corporations" they necessarily include within that word corporations created under state law. Some Federal statutes are expressly applicable to state created corporations. *See, e.g.*, 15 U.S.C. § 7; *Melrose Distillers* v. *United States*, 1959, 359 U.S. 271, 272. In this case New Emprise was convicted of violations of 18 U.S.C. §§ 371 and 1952. § 371 refers to "persons" and § 1952 to "[w]hoever." Under the Federal Rules of Construction, 1 U.S.C. § 1.

> "In determining the meaning of any Act of Congress, unless the context indicates otherwise—
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> * * *
>
> the words 'person' and 'whoever' include corporations * * * as well as individuals;
>
> * * * *"

The term "corporations" as used in 1 U.S.C. § 1 clearly includes corporations formed under state law. See *Alamo Fence Company of Houston* v. *United States*, 5 Cir., 1957, 240 F.2d 179, 181. Nothing in the contexts of §§ 371 and 1952 indicates meanings for the terms "persons" and

[1] *U.S. Const.* art. I, § 8.

"whoever" other than those of 1 U.S.C. § 1. Therefore, the existence and status of corporations charged under §§ 371 and 1952 should be determined by reference to the law of the state of their incorporation, unless the application of that law would conflict with federal policy. *Cf. Melrose Distillers* v. *United States, supra*, 359 U.S. at 274. In this case, no such conflict exists, and New York law, therefore, will be applied.

Convenience and common sense also point to the adoption of New York law as the federal law in this case, for the purpose of determining whether New Emprise is criminally liable. Both Old and New Emprise are artificial creations, wholly dependent on New York law for their existence. New York law defines their powers, rights and liabilities, prescribes their procedures, governs their continued existence, and defines the terms upon which mergers may occur and the effect to be given to mergers. These corporations were created under New York law by people, however, and any penalty imposed on them is, indirectly, a penalty imposed upon the people who own and control them. If New York law provides for the imposition of such a penalty for acts for which those people bear the ultimate responsibility, there is no good reason for relieving them of the penalty because it arises from federal law. See *Alamo Fence Company of Houston* v. *United States, supra*, 240 F.2d at 183.

Under modern state corporation laws, a corporation once formed, in the absence of a provision limiting its juristic life, exists perpetually unless it is dissolved or its corporate charter is annulled.[2] It is often said that the merger of a corporation into another is similar to the death of an

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[2] "Neither bankruptcy . . . nor cessation of business . . . nor dispersion of stockholders, nor the absence of directors . . . nor all combined, will avail without more to stifle the breath of juristic personality. The corporation abides as an ideal creation, impervious to the shocks of these temporal vicissitudes. Not even the sequestration of the assets at the hands of a receiver will terminate

individual, in that all current or future litigation by or against it is abated except insofar as the state of incorporation may continue its juristic life. *Melrose Distillers* v. *United States*, 1959, 359 U.S. 271, 272; *Oklahoma Natural Gas Co.* v. *Oklahoma*, 1927, 273 U.S. 257, 259-60; *United States* v. *Safeway Stores, Inc.*, 10 Cir., 1944, 140 F.2d 834, 836; *United States* v. *Brakes, Inc.*, 157 F. Supp. 916, 918-19 (S.D.N.Y. 1958); *United States* v. *Cigarette Merchandisers Ass'n*, 136 F. Supp. 214, 215 (S.D.N.Y. 1955) (and cases cited therein at 215, n.4). We turn to the New York law to determine the effect of the merger in this case.

The relevant state statute governing the question here is *N. Y. Bus. Corp. Law* § 906(b)(3) (McKinney 1963), which provides that after a certificate of merger or consolidation has been filed,

> The surviving or consolidated corporation shall assume and be liable for all of the liabilities, obligations and penalties of each of the constituent corporations. No liability or obligation due or to become due, claim or demand for any cause existing against any such corporation, or any shareholders, officer or director thereof, shall be released or impaired by such merger or consolidation. No action or proceeding, whether civil or criminal, then pending by or against any such constituent corporation, or any shareholders, officer or director thereof, shall abate or be discontinued by such merger or consolidation, but may be enforced, prosecuted, settled or compromised as if such merger or consolidation had not occurred, or such surviving or consolidated corporation may be substituted in such action or special proceeding in place of any constituent corporation.

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its being." *Petrogradsky Mejdunarodny Kommerchesky Bank* v. *Nat'l City Bank of New York*, 1930, 253 N.Y. 23, 31-32, 170 N.E. 479, 482 (Cardozo, C. J.), *reargument denied*, 1930, 254 N.Y. 563, 173 N.E. 867, *cert. denied* 1930, 282 U.S. 878.

The first sentence of § 906(b)(3) states that the surviving corporation is liable for its constitutents' "liabilities, obligations and penalties. . . ." While no court has decided whether "liabilities" and "obligations" as used in § 906(b)(3) refer to criminal liabilities and obligations, two courts have held that these words, as used in other provisions of New York's corporation laws, do refer to criminal liability. *United States* v. *Cigarette Merchandisers Ass'n., supra* (construing § 90 of the New York Stock Corporation Law); *People* v. *Bankers' Capital Corp.*, 1930, 137 Misc. 293, 241 N.Y.S. 693 (construing § 216(1)(e) of the New York General Corporation Law). We note, too, that § 906(b)(3) also uses the word "penalties." We therefore hold that the first sentence of § 906(b)(3) permits the maintenance of a prosecution against the surviving corporation for crimes allegedly committed by a constitutent corporation.

Such a construction of New York's corporation law is not unique. New York courts have held that civil causes of action arising before a merger or consolidation may be instituted against the surviving or the consolidated corporation. *O'Brien* v. *New York Edison Co., et al.* (two cases). 19 F. Supp. 968 (S.D.N.Y. 1937); *Cameron* v. *United Traction Co.*, 1902, 67 App. Div. 557, 73 N.Y.S. 981; *Lee* v. *Stillwater and Mechanicville St. Ry. Co.*, 1910, 140 App. Div. 779, 125 N.Y.S. 840. Appellants cite numerous cases which hold that a constitutent corporation [3] or a dissolved corporation [4] remains subject to criminal prosecution. None of

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[3] *United States* v. *Stone*, 8 Cir., 1971, 452 F.2d 42; *United States* v. *Anaconda American Brass Co.*, 210 F. Supp. 873 (D.Conn. 1962); *United States* v. *Maryland and Virginia Milk Producers, Inc.*, 145 F. Supp. 374 (D.D.C. 1956); *United States* v. *Cigarette Merchandisers Ass'n, Inc., supra; United States* v. *Union Carbide and Carbon Corp.*, 132 F. Supp. 388 (D.Colo. 1955), *modified*, 10 Cir., 1956, 230 F.2d 646.

[4] *Melrose Distillers, Inc.* v. *United States, supra; United States* v. *BBF Liquidating, Inc.*, 9 Cir. 1971, 450 F.2d 938; *Alamo Fence Co. of Houston* v. *United States*, 5 Cir., 1957, 240 F.2d 179; *United*

these cases, however, holds that a surviving corporation (in the case of a merger or consolidation) may not be prosecuted. These cases therefore do not conflict with our holding. We adopt, as to the liability of New Emprise, the New York law as the federal law in this case. We leave to another day the question whether we would borrow applicable state law if that law were to purport to relieve both the constituent corporation and the surviving corporation of liability for crimes of the constituent corporation.

XVII. *Sufficiency of the Evidence.*

Appellants argue that the evidence is insufficient to sustain their convictions. Except as to appellant Giordano, whose arguments we have discussed above (see part XV, *supra*, their arguments lack substance. It would serve no useful purpose to set out the evidence in detail. We have examined it, and we find it more than sufficient.

XVIII. *The Taint of Illegal Electronic Surveillance.*

Appellants claim that the trial was materially tainted by leads from unlawful electronic surveillance.

Between 1962 and 1965, the government intercepted and recorded numerous telephone conversations of appellants Zerilli, Polizzi and Giordano. The product of this surveillance is embodied in typewritten transcriptions or "logs" of the intercepted conversations. The government concedes that the electronic surveillance was conducted illegally.

The prosecutors were initially unaware of this surveillance, but on June 3, 1971, they were informed of it by the Justice Department. On September 8, 1971, the district court ruled that there would be a post-trial *Alderman* hearing.[5] An *in camera* hearing was held on November 13, 1971,

States v. *P. F. Collier & Son Corp.*, 7 Cir., 1953, 208 F.2d 936; *United States* v. *Globe Chemical Co.*, 311 F. Supp. 535 (S.D. Ohio 1969); *United States* v. *Arcos Corp.*, 234 F. Supp. 355 (N.D. Ohio 1964); *United States* v. *San Diego Grocers Ass'n, Inc.*, 177 F. Supp. 352 (S.D. Cal. 1959); *United States* v. *Brakes, Inc.*, *supra*.

[5] *Alderman* v. *United States*, 1969, 394 U.S. 165.

at which the court ruled that pre-trial access to the logs would be limited to appellants Zerilli, Polizzi, Giordano, and their respective attorneys. At the post-trial *Alderman* hearing, which commenced on June 12, 1972, and continued on June 13, June 14, June 15, June 23, and July 7, 1972, the court concluded that "the evidence in this case came from an independent source and was not tainted by the illegal electronic surveillance."

Appellants argue that the evidence accumulated from the unlawful surveillance was used in their prosecution and fatally contaminated their trial. Alternatively, they ask that we remand for a more complete *Alderman* hearing.

a. *Standing.*

Only Zerilli, Polizzi and Giordano were subjected to electronic surveillance and the court ordered that only these three appellants and their attorneys be given access to the logs. On appeal, appellants Shapiro and Bellanca assert that they, as coconspirators, should also have been given access to these logs. This same argument was made by petitioners in *Alderman* v. *United States, supra,* and was rejected. 394 U.S. at 171-76. See also *Mancusi* v. *DeForte,* 1968, 392 U.S. 364; *Simmons* v. *United States,* 1968, 390 U.S. 377; *Jones* v. *United States,* 1960, 362 U.S. 257, 261; *Wong Sun* v. *United States,* 1963, 371 U.S. 471, 491-92; *Goldstein* v. *United States,* 1942, 316 U.S. 114, 121. The court's ruling as to standing was correct.

b. *The Existence of Taint.*

At an *Alderman* hearing, the court must determine whether the prosecution used unconstitutionally seized material directly or indirectly to develop the evidence it produced at trial, or obtained its trial evidence from an independent and untainted source. *Alderman* v. *United States, supra,* 394 U.S. at 183. A defendant who shows that he was the victim of an unconstitutional search "must go forward with specific evidence demonstrating taint." 394

U.S. at 183. Then the burden shifts to the government to show that it acquired its evidence from an independent source.[6]

Appellants make numerous arguments to show that their trial was tainted by the use of the logs. We consider them seriatim.

1. *The benchside conference of March 28, 1972.*

Polizzi testified on direct examination that he was unable to obtain a Nevada gambling license in March, 1966, because he had a "problem." [R.T. 5391, 5398, 5402.] On cross-examination, the prosecutor asked the nature of Polizzi's problem. Polizzi then stated that his "problem" was that in 1963 he had been placed on the Attorney General's list of Mafia figures. [R.T. 5466.]

On redirect examination, Polizzi's attorney returned to the subject of the Mafia. Polizzi testified:

> "It was Mr. George Edwards who was the police commissioner of the City of Detroit that made his testimony before the Senate Committee, and he was the one that was directly responsible for putting my name on this chart.
>
> . . . I was very disturbed and felt that I was falsely accused. I wrote a letter to the Mayor of Detroit and felt that it was unjust that for no rhyme or reason to just be put on there and be falsely accused of these things . . . ." [R.T. 5576-77.]

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[6] "The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin." *Nardone* v. *United States*, 1939, 308 U.S. 338, 341. *See also Alderman, supra*, 394 U.S. at 183.

At this point, Mr. Kotoske, the prosecutor, approached the bench and, outside of the jury's hearing, told the court that Polizzi was perjuring himself and threatened to introduce the surveillance logs showing Polizzi's ties with organized crime in Detroit:

> "Mr. Kotoske . . . [I]f [Mr. Murphy, Polizzi's attorney] read those logs at all he understands that this man on the witness stand [Polizzi] and Tony Zerilli laid out the whole Mafia organization in Detroit, how they cut up black money— . . . .
>
> They laid out the whole organization, who is on this payoff, who is running the rackets, how the money is transferred, all discussion about black money, who it is that they have to eliminate from the organization, who they are going to—the whole complete thing, the complete structure is laid out there.
>
> I have sat by for about six weeks and let this nonsense go on. If he continues to persist in this, I have no alternative but to confront this witness with his own transcription of his voice and make him out a crown liar right in this courtroom.
>
> I don't want to do that . . . .
>
> We had better draw the line and abandon the topic or I am telling counsel I will come forward with those logs . . . .
>
> The Court: Mr. Murphy, let me say this:
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> . . . [T]his thing has gone far enough. You have the ability to have your client make the explanation that he has made, but my suggestion to you—I am not ordering it at all, but my suggestion to you is that you ought not go much further with that because it may open a wider door than you want to have opened. And I do not want this trial to get into a public accusation of who is or is not a member of the Mafia . . . ." [R.T. 5578-80.]

The line of questioning about the Mafia was dropped by Polizzi's counsel and the government never introduced the logs to impeach Polizzi's testimony.

Appellants contend that the incident was a use of the surveillance logs at the trial and tainted the entire case. We cannot agree, although it was indeed a "use." First, no evidence from the logs was actually introduced. The prosecutor only threatened to use the logs to impeach Polizzi's character. Second, the government's threat came only after Polizzi at least twice testified to his own lack of Mafia connections, once on direct and again on cross. It cannot be said that the prosecutor's threat hindered the defense from making its point to the jury. Third, the threat to use the tapes did not form part of the government's case; it related solely to impeachment, after Polizzi had testified to his own lack of Mafia ties. *Walder* v. *United States,* 1954, 347 U.S. 562, 565; *cf. Harris* v. *New York,* 1971, 401 U.S. 222. Such use would not be an unlawful taint.

2. *The leak to the press.*

On March 29, 1972, the day after the benchside conference, one Gene Blake, a *Los Angeles Times* reporter, was seen reading the government's copy of the previous day's transcript. [R.T. 5786.] Defendants' counsel accused the prosecutor of deliberately providing Mr. Blake with the transcript; the prosecutor denied this charge.[7] Defendant's counsel then asked the court to order the *Times* not

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[7] "Mr. Kotoske: May I make a full and complete but short statement, your Honor?

[A]bout giving transcripts of the daily proceedings to any newspaperman, I never in my life have done that. I have never done that in this case. I did see Mr. Blake reading from the transcript and I personally took it upon myself to go over to him this morning and ask him to please not print anything that transpired at the side bar. That is the fact, that is not fantasy." R.T. 5790-91.

to report on the March 28 benchside conference, but the court refused.

The next day a *Times* article was headlined "Transcript Shows U.S. Bugged Vegas Defendants' Mafia Talks." The article contained direct quotes from the March 28 benchside conference concerning the surveillance logs. Appellants assume that the jury saw this article and took it into account in reaching its verdict, and that therefore the trial was tainted by information from the logs. We cannot agree. There was no evidence that any juror read this article, nor were the logs used by the jury in their deliberations. Thus there was no "relevance to [appellants convictions] of any conversations which may have been overheard through . . . surveillance." *Alderman* v. *United States, supra,* 394 U.S. at 186.

3. *The Friedman sentencing memorandum.*

One of the major sources of the prosecutor's case was the Friedman sentencing memorandum, a document prepared in connection with the sentencing of Maurice Friedman on February 3, 1969, in another case. Appellants claim that this document was tainted by information from the surveillance logs.

Looking at the evidence in the light most favorable to the government, the following testimony was produced concerning the sentencing memorandum: U. S. Attorney David Nissen, who wrote this memorandum, relied on three sources for its preparation: (1) information he received from FBI agent Wayne Hill, (2) a tape supplied to him by one Dr. Victor Lands in connection with another trial (the Lands transcript), and (3) information he received from (then) U. S. Attorney William Matthew Byrne, Jr. [R.T. 10,029-31.]

Appellants do not claim that the Lands transcript or Byrne's information is tainted; their only objection concerns agent Hill's information. Hill testified that all the

information he received, which he subsequently passed on to Nissen, came from either "live Bureau informants" (civilian informants) or from the Intelligence Division of the Los Angeles Police Department. [R.T. 9421-24.] He was then asked:

> "Q. Now do you know, Mr. Hill, that any of the information you provided Mr. Nissen that found its way into this sentencing memorandum was the result or can in any way be attributed to the surveillance logs in this case?
>
> A. No, it could not." [R.T. 9425.]

On cross-examination, Hill said that these live Bureau informants gave information to various FBI agents around the country, who passed the material on to Hill, who, in turn, passed the information on to Nissen, who wrote the memorandum. [R.T. 9522-23, 9563-65.] Although the names of the informants were not revealed [R.T. 9523], agent Hill did provide the names of two FBI agents who received such information. [R.T. 9524, 9531, 9563-64.] The appellants did not produce any evidence to refute Hill's testimony. The court properly concluded that the Friedman sentencing memorandum was not tainted.[8]

4. *Lack of FBI monitors at the Alderman hearing.*

Appellants argue that they did not receive a fair *Alderman* hearing because only one of the FBI personnel who conducted electronic surveillance was called as a witness.

---

[8] Appellants claim that "the court refused even to permit appellants, at their own expense to produce those agents to find out the names of the purported live informants who are the sources of the Friedman sentencing memorandum allegations [52 RT 10,474-76]." Electronic Surveillance Brief at 20. The court clearly acted within its discretion in refusing to allow the names of the informants to be revealed. Appellants, however, could have called these agents to ask other questions about how they gathered the information which was subsequently passed on to Hill. The court did not preclude the appellants from calling these agents.

Alderman provides a flexible standard as to what witnesses must be examined in a taint hearing:

> "Armed with the specified records of overheard conversations and with the right to cross-examine the appropriate officials in regard to the connections between those records and the case made against him, a defendant may need or be entitled to nothing else. Whether this is the case or not must be left to the informed discretion, good sense, and fairness of the trial judge." *Alderman, supra,* 394 U.S. at 185.

The district court adopted the following procedure to govern the taint hearing: There were numerous government officials throughout the country who had had access to the surveillance logs. The critical issue at the taint hearing, however, was not whether these officials had had access to the logs but whether any knowledge of the contents of the logs was imparted by these officials to the United States prosecutors in Los Angeles. Thus, instead of bringing all the government officials to the hearing, the court ordered the government to provide the defense with the names of all of them so that the defendants could ask each government prosecutor, on the witness stand, whether he had received any information about the logs from the named officials.[9] [Clerk's Transcript (hereinafter referred to as C.T.) 3321.]

At the taint hearing, three members of the prosecution team testified that the source of this case was the Friedman interview and sentencing memorandum.[10] Two members of

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[9] The court did not preclude calling any of these officials as witnesses, but stated only that they should not be called "unless there is some reason to believe that any of those persons communicated any information received from the tapes to any of the persons who had charge of the preparation of the evidence in this case." C.T. 3321.

[10] R.T. 9224 (U. S. Attorney Byrne), 9546-47 (agent Hill), 10,031 (U. S. Attorney Nissen).

the team testified that they were not even aware of the existence of the logs when the indictments in this case were handed down on February 26, 1971.[11] Judge Byrne, who left the United States Attorney's office in May, 1970, testified that he did not know that the logs existed in February, 1970, when he interviewed Mr. Friedman. [R.T. 9225.] U. S. Attorney Hornbeck knew of the existence of the logs, but had not read them and therefore did not use any information from the logs to assist him before the grand jury. [R.T. 10,262.] In addition, three members of the team testified that they did not contact any government officials who had access to the logs.[12] Two other attorneys did contact one of these officials, James Ritchie,[13] but none of the information received from Ritchie related to the logs. This information, which consisted of some bank records, audits, and IRS personal interviews, was the result of subpoenas served on banks or of personal interviews.

The picture which thus emerges from the taint hearing is that no member of the prosecution team had read the logs or had any information derived from them when the indictments were handed down. Only two attorneys had contacted a government official who had access to these logs, and the information received from him was not derived from the logs. Moreover, by the time the indictments were handed down the evidence gathering process was complete, and no other significant evidence was produced at the trial. Counsel for appellants did not produce any witnesses to refute this testimony.

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[11] R.T. 10,032-33 (U. S. Attorney Nissen), 9283 (U.S. Attorney Friedman).

[12] R.T. 9282-84 (Friedman), 9428-29, 9437-39 (Hill), 10,033 (Nissen).

[13] R.T. 10,245-46 (Hornbeck), 9751 (Uelmen).

While FBI monitors have testified at some taint hearings,[14] there is no rule that they must testify. The issues raised in cases in which the court has ordered FBI personnel to testify [15] are obviated here as a result of the prosecution team's undisputed testimony that they received no information related to the logs from any government officials who had access to the logs.

The district court concluded that the government met its "ultimate burden of persuasion to show that its evidence is untainted." *Alderman, supra,* 394 U.S. at 183. Having carefully examined the evidence produced at the taint hearing, we agree with the district court's finding.

We find it interesting that nowhere in their briefs do defense counsel, who had access to the logs, assert that anything in them was of such a character as to provide any leads or information pointing to or material to the present prosecution.

Affirmed.

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[14] *See, e.g., United States* v. *Stassi,* 5 Cir., 1970, 431 F.2d 353; *Baker* v. *United States,* D. C. Cir., 1970, 430 F.2d 499, *cert. denied,* 1970, 400 U.S. 965; *United States* v. *Clay,* 5 Cir., 1970, 430 F.2d 165, *rev'd. on other grounds,* 1971, 403 U.S. 698; *United States* v. *Ivanov,* 342 F.Supp. 928 (D.N.J. 1972).

[15] *See, e.g., United States* v. *Giordano,* 6 Cir., 1971, 440 F.2d 449; *United States* v. *Alderisio,* 10 Cir., 1970, 424 F.2d 20.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-2983

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

MICHAEL SANTO POLIZZI, *Defendant-Appellant.*

No. 72-2984

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JACK S. SHAPIRO, *Defendant-Appellant.*

No. 72-2985

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

PETER JAMES BELLANCA, *Defendant-Appellant.*

No. 72-2986

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

ANTHONY GIORDANO, *Defendant-Appellant.*

No. 72-2987

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

ARTHUR J. ROOKS, *Defendant-Appellant.*

No. 72-2988

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

ANTHONY JOSEPH ZERILLI, *Defendant-Appellant.*

No. 72-2989

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

EMPRISE CORPORATION, a New York corporation,
Defendant-Appellant.

ORDER

[July 18, 1974]

Before: BROWNING and DUNIWAY, Circuit Judges, and **RENFREW, District Judge

The opinion filed April 30, 1974, is modified as follows:

Slip Opinion, page 3, third line from bottom:

Change line to read: "lant Giordano's* motion for severance." Add the following footnote: "*In the indictment, appellant's name was spelled Giardano. His true name is Giordano."

Slip Opinion, page 16, lines 14-16:

Change lines to read: "at 492. That phrase does not require specific intent to violate state law, but rather specific intent to facilitate an activity which the accused knew to be unlawful under state law. This interpretation, apart from its inconsistency with the literal".

Slip Opinion, page 35, last line, to page 36, line 6:

Delete the third and fourth sentences of the paragraph and footnote 57 on page 36 and substitute the following: "There was no express reference to the Mafia in the prosecutor's statement, nor could such a reference be reasonably implied."

Slip Opinion, page 36, seventh line from bottom, to page 37, line 20:

Delete the last four sentences of the paragraph beginning on page 36 and the first two full paragraphs and footnote 57 on page 37, and substitute the following:

> For all that the jury knew from Polizzi's direct testimony, his "problem" could have been one of short duration—e.g., insufficient financing—which would not

** Honorable Charles B. Renfrew, United States District Judge, Northern District of California, sitting by designation.

have indefinitely precluded licensing. If so, there would have been no motive for furtive investment. Thus, the nature of Polizzi's "problem" was clearly relevant. And while the trial judge did order Polizzi to answer the question regarding the "problem" he did not order the defendant to use the word "Mafia." Pollizi could have answered the question truthfully and specifically without using the "Mafia" term—for example, he could have said that he understood that he would not be considered a suitable person for a license.

Thus, since the general nature of Polizzi's problem was directly relevant and the prejudicial Mafia connection was volunteered by Polizzi, the trial court's ruling was well within its wide discretion in controlling cross-examination and in balancing its probative value against possible prejudice.

This result is even clearer as to Zerilli. The reason why Zerilli could not be licensed was not admissible merely to impeach Zerilli or his attorney—it was directly relevant to Zerilli's guilt. If the reason Zerilli could not be licensed was, as he testified, his ownership interest in a race track, then his testimony of continuing interest in the enterprise because of an intention to invest later might be credible. The race track regulation was apparently unclear and Zerilli could in any event sell his race track interest. However, if the reason he could not be licensed was his reputation, then any hope of investing later would be doubtful since his reputation was unlikely to change. Zerilli therefore had a strong motive to make his investment surreptitiously. Moreover, there was no mention of the Mafia in connection with Zerilli, only of his "reputation," so that the court did not err in permitting the government to cross-examine Zerilli on the reasons why he could not be licensed.

Slip Opinion, page 49, lines 8-10:

Delete the second sentence of the paragaph and footnote 77.

Slip Opinion, page 50, line 1:

Delete the reference to footnote 78 and the footnote.

Slip Opinion, page 71, lines 6-8:

Delete the first sentence of the paragraph and substitute the following: "Between 1962 and 1965, the government conducted electronics surveillance against appellants Zerilli, Polizzi and Giordano."

Slip Opinion, page 74, line 12:

Change citation to read: *Walder* v. *United States,* 1954, 347 U.S. 62, 65.

Slip Opinion, page 78, lines 14-17:

Delete the entire paragraph.

Slip Opinion, pages 37-50:

Change footnote 59 to 57 and renumber the following footnotes to reflect the deletion of present footnotes 57, 58, 77 and 78.

The panel as constituted in the above cases has voted to deny the petitions for rehearing and to reject the suggestions for rehearing in banc.

The full court has been advised of the suggestions for in banc rehearing, and no judge of the court has requested a vote on the suggestions for rehearing in banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing in banc are rejected.

Dated: July 18, 1974

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 72-2983, 72-2984, 72-2985
72-2986, 72-2987, 72-2988, 72-2989

UNITED STATES OF AMERICA, *Appellee*,

v.

EMPRISE CORPORATION, ET AL, *Appellants*.

ORDER CORRECTING DATE OF FILING OF ORDER DENYING PETITIONS FOR REHEARING

(Filed August 5, 1974)

Upon reading and filing the motion of appellant Emprise Corporation filed on behalf of all appellants, and the affidavit of Joseph D. Mullender, Jr., attached thereto, and it appearing therefrom that the order denying the petitions for rehearing was made and filed on July 18, 1974, but that copies of the same were not mailed to counsel for the appellants until July 25, 1974, and that counsel for the appellants did not learn of the making of said order until July 25, 1974, and good cause appearing,

IT IS ORDERED that the date of filing of said order denying the petitions for rehearing be and it hereby is corrected to be July 25, 1974.

DATED: Aug. 5, 1974.

JAMES R. BROWNING,
Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-2983

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

MICHAEL SANTO POLIZZI, *Defendant-Appellant.*

No. 72-2984

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JACK S. SHAPIRO, *Defendant-Appellant.*

No. 72-2985

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

PETER JAMES BELLANCA, *Defendant-Appellant.*

No. 72-2986

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

ANTHONY GIORDANO, *Defendant-Appellant.*

No. 72-2987

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

ARTHUR J. ROOKS, *Defendant-Appellant.*

No. 72-2988

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

ANTHONY JOSEPH ZERILLI, *Defendant-Appellant*.

No. 72-2989

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

EMPRISE CORPORATION, a New York corporation, *Defendant-Appellant*.

ORDER

(Filed August 12, 1974)

Before: BROWNING and DUNIWAY, Circuit Judges, and RENFREW,* District Judge

The motion on behalf of all appellants to file a supplemental petition for rehearing and suggestion of appropriateness of rehearing in banc is denied.

The motion on behalf of all appellants to augment the record on appeal is denied.

Upon application of appellants Polizzi, Shapiro, Bellanca, Giordano, Rooks, and Zerilli, and good cause appearing,

IT IS ORDERED that the issuance of the mandate in respect to the judgment of each moving appellant be stayed pending the filing, consideration and disposition by the Supreme Court of the United States of such appellant's petition for writ of certiorari, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States

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* Honorable Charles B. Renfrew, United States District Judge, Northern District of California, sitting by designation.

on or before September 15, 1974, or within any extended period of time as may be determined by the Supreme Court, or any justice thereof, or this court, or any judge thereof. In the event such petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

The motion on behalf of all appellants to file a supplemental petition for rehearing and suggestion of appropriateness of rehearing in banc is denied.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-29

EMPRISE CORPORATION, *Petitioner,*

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 16, 1974.

/s/ W. O. DOUGLAS
Associate Justice of the Supreme Court of the United States

Dated this 8th day of August, 1974

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment to the United States Constitution:

No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.

The Travel Act, 18 U.S.C. § 1952:

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Added Pub.L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498, and amended Pub.L. 89-68, July 7, 1965, 79 Stat. 212.

Nevada Gaming Control Act, Nevada Revised Statutes:

§ 463.160 License required.

1. It is unlawful for any person, either as owner, lessee or employee, whether for hire or not, either solely or in conjunction with others:

(a) To deal, operate, carry on, conduct, maintain or expose for play in the State of Nevada any game or slot machine as defined in this chapter, or to operate, carry on, conduct or maintain any horserace book or sports pool; or

(b) To provide or maintain any information service the primary purpose of which is to aid the placing or making of wagers on events of any kind; or

(c) To receive, directly or indirectly, any compensation or reward or any percentage or share of the money or property played, for keeping, running, carrying on or permitting the same to be carried on,

without having first procured, and thereafter maintaining in full force and effect, all federal, state, county and municipal gaming licenses as required by statute or ordinance or by the governing board of any unincorporated city or town.

2. It is unlawful for any person to lend, let, lease or otherwise deliver or furnish any equipment of any gambling game, including any slot machine, for any interest or any percentage or share of the money or property played, under guise of any agreement whatever, without having first procured a state gaming license for the same.

3. It is unlawful for any person to lend, let, lease or otherwise deliver or furnish, except by a bona fide sale, any slot machine under guise of any agreement

whatever whereby any consideration whatever is paid or is payable for the right to possess or use such slot machine, whether such consideration is measured by a percentage of the revenue derived from such machine or by a fixed fee or otherwise, without having first procured a state gaming license for the same.

4. Any person who shall knowingly permit any gambling game, slot machine or device to be conducted, operated, dealt or carried on in any house or building or other premises owned by him, in whole or in part, except by a person who is licensed hereunder, or his employee, shall be guilty of a gross misdemeanor.

5. Any licensee who puts additional games or slot machines into play without authority of the commission to do so or any licensee who fails to remit when due any license fee provided for by this chapter shall be liable for the penalty provided for in NRS 463.400 in addition to the penalty provided for in this section.

[16:429:1955]—(NRS A 1959, 437; 1961, 662; 1965, 1032)

§ 463.170 Qualifications for state license.

1. Any person who the commission shall determine is a suitable person to receive a license under the provisions of this chapter, having due consideration for the proper protection of the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada, may be issued a state gaming license. The burden of proving his qualification to receive or hold any license hereunder shall be at all times on the applicant or licensee.

2. No corporation, limited partnership, business trust or organization or other association of a quasi-corporate character shall be eligible to receive or hold any license under this chapter unless all persons having any direct or indirect interest therein of any nature whatsoever, whether financial, administrative, policy-making or supervisory, are individually qualified to be licensed under the provisions of this chapter.

3. The commissi.. may, by regulation, limit the number of persons who may be financially interested and

the nature of such interest in any corporation or other organization or association licensed under this chapter, and establish such other qualifications for licenses as they may, in their uncontrolled discretion, deem to be in the public interest.

[17:429:1955]—(NRS A 1959, 438)

§ 463.200 Application for state license: Contents; supplemental forms.

1. Application for a state gaming license shall be made to the board on forms furnished by the board and in accordance with the regulations of the commission.

2. The application shall include:

(a) The name of the proposed licensee.

(b) The location of his place or places of business.

(c) The gambling games, gaming device or slot machines to be operated.

(d) The names of all persons directly or indirectly interested in the business and the nature of such interest.

(e) Such other information and details as the board may require in order to discharge its duty properly.

3. The board shall furnish to the applicant supplemental forms, which the applicant shall complete and file with the application. Such supplemental forms shall require, but shall not be limited to, complete information and details with respect to the applicant's antecedents, habits, character, criminal record, business activities, financial affairs and business associates, covering at least a 10-year period immediately preceding the date of filing of the application.

[20:429:1955]

New York Business Corporation Law, Article 9:

§ 901(a)(3) "Constituent corporation" means an existing corporation that is participating in the merger or consolidation with one or more other corporations.

(4) "Surviving corporation" means the constituent corporation into which one or more other constituent corporations are merged.

(5) "Consolidated corporation" means the new corporation into which two or more constituent corporations are consolidated. L.1961, c.855, eff. Sept. 1, 1963.

* * *

§ 906(b)(3) The surviving or consolidated corporation shall assume and be liable for all the liabilities, obligations and penalties of each of the constituent corporations. No liability or obligation due or to become due, claim or demand for any cause existing against any such corporation, or any shareholder, officer or director thereof, shall be released or impaired by such merger or consolidation. No action or proceeding, whether civil or criminal, then pending by or against any such constituent corporation, or any shareholder, officer or director thereof, shall abate or be discontinued by such merger or consolidation, but may be enforced, prosecuted, settled or compromised as if such merger or consolidation had not occurred, or such surviving or consolidated corporation may be substituted in such action or special proceeding in place of any constituent corporation.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2–3
Statement	3
Argument	6
Conclusion	21

CITATIONS

Cases:

Adickes v. *Kress & Co.*, 398 U.S. 144	10
Alderman v. *United States*, 394 U.S. 165	14, 15
Chambers v. *Mississippi*, 410 U.S. 284	17
Lawn v. *United States*, 355 U.S. 339	10
Nevada Tax Commission v. *Hicks*, 73 Nev. 115, 310 P.2d. 852	8
Rewis v. *United States*, 401 U.S. 808	8
United States v. *Archer*, 486 F.2d 670	8
United States v. *Branker*, 395 F.2d 881	18
United States v. *Carter*, 311 F.2d 934	20
United States v. *Glick*, 463 F.2d 491	10
United States v. *Gordon*, 464 F.2d 357	8
United States v. *Harris*, 458 F.2d 670	18
United States v. *Jorgenson*, 451 F.2d 516, certiorari denied, 405 U.S. 922	10
United States v. *Kelly*, 349 F.2d 720	17
United States v. *Larkin*, 417 F.2d 617	10
United States v. *McCoy*, 429 F.2d 739	10
United States v. *Marion*, 404 U.S. 307	16
United States v. *Palladino*, 475 F.2d 65	10
United States v. *Smith*, 411 F.2d 733	10
United States v. *Spector*, 326 F.2d 345	17
United States v. *Stagman*, 446 F.2d 489	9

Statutes:

	Page
Jencks Act, 18 U.S.C. 3500	12
Travel Act, 18 U.S.C. 1952	3, 6
18 U.S.C. 371	3
18 U.S.C. 1955	8
Bus. Corp. Law § 906(b) (3), McKinney's Consolidated Laws of New York Annotated	20

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-283

EMPRISE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-322

MICHAEL SANTO POLIZZI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 74-323

ANTHONY GIORDANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A),[1] as modified (Pet. App. C), is reported at 500 F. 2d 856.

[1] "Pet. App." as used herein refers to the appendix to the petition in No. 74-322.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1974. Petitions for rehearing were denied on July 25, 1974. Mr. Justice Douglas extended the time for filing the petition for a writ of certiorari in No. 74–283 to September 16, 1974, and in Nos. 74–322 and 74–323 to September 23, 1974, and the petitions were filed on those respective dates. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Travel Act proscribes the use of interstate facilities to carry on a gambling enterprise in violation of a state law that prohibits the sharing in the proceeds of such an enterprise by persons whose identities have not been disclosed in the application for a gaming license.

2. Whether the phrase "intent to * * * facilitate the * * * carrying on of any unlawful activity" in the Travel Act refers to specific intent personally to violate state law or to specific intent to facilitate the carrying on of an activity that is itself known to be in violation of state law.

3. Whether prejudicial publicity deprived petitioners of a fair trial.

4. Whether petitioners were prejudiced by the inclusion of petitioners Polizzi and Zerilli on a Department of Justice list of known Mafia figures or by use of the term "Mafia" before the grand jury or at trial.

5. Whether the use of a prior consistent statement to rehabilitate a government witness and the late disclosure of that statement to the defense constituted reversible error.

6. Whether the government made undisclosed promises of leniency to a prosecution witness.

7. Whether the district court was correct in its conclusion, reached after an *Alderman* hearing, that the evidence at trial was untainted by unlawful electronic surveillance.

8. Whether the cumulative effect of alleged errors resulted in the denial of a fair trial.

9. Whether the evidence against petitioner Giordano was either improperly admitted or insufficient to sustain his conviction.

10. Whether the district court abused its discretion in denying petitioner Giordano's motion for severance.

11. Whether it was proper to instruct the jury that it could consider as to petitioner Giordano evidence admitted after he had rested at the close of the government's case.

12. Whether petitioner Emprise Corporation, as the survivor of a statutory merger between a parent corporation and its subsidiary, is liable for criminal acts committed by the subsidiary prior to the merger.

STATEMENT

After a ten-week jury trial in the United States District Court for the Central District of California, all petitioners were convicted of conspiracy to violate the Travel Act, 18 U.S.C. 1952, in violation of 18 U.S.C. 371, and petitioners Polizzi, Shapiro, Bellanca, and Zerilli were additionally convicted of numerous substantive violations of the Travel Act. Petitioners received the following sentences: Polizzi, six concurrent terms of four years' imprisonment and an aggre-

gate fine of $40,000; Sapiro, six concurrent terms of three years' imprisonment and an aggregate fine of $30,000; Bellanca, seven concurrent terms of five years' imprisonment, all but 179 days of which were suspended, and an aggregate fine of $20,000; Giordano, a term of four years' imprisonment and a fine of $10,000; Rocks, a term of five years' imprisonment, all but 90 days of which were suspended, and a fine of $10,000; Zerilli, eight concurrent terms of four years' imprisonment and an aggregate fine of $40,000; and Emprise Corporation, a fine of $10,000. The court of appeals affirmed in a comprehensive and lengthy opinion (Pet. Apps. A and C; 500 F. 2d 856).[2]

The facts are set forth in detail in the government's brief in the court of appeals (at pp. 4–114).[3] Briefly, the government proved that Zerilli and Polizzi, aided by their co-conspirators, obtained hidden control of and operated a gambling enterprise in Las Vegas, Nevada, in violation of Nevada criminal law. In carrying on this unlawful activity petitioners conspired to use, and certain of them did use, various interstate facilities, thereby violating the Travel Act.

In March 1966, the opportunity arose for Polizzi and Zerilli to acquire control of Vegas Frontier, Inc. (hereafter "VFI"), a Nevada corporation that was to operate the Frontier Hotel and Casino pursuant to

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[2] Errata in the original opinion of April 30, 1974 (Pet. App. A) were corrected in the modified opinion of July 25, 1974 (Pet. App. C). References herein to the court's opinion will be made both to the reported opinion, which contains the text of the opinion as modified, and to Pet. Apps. A and C.

[3] A copy of the government's brief below has been lodged with the Clerk of this Court.

a gambling license. However, the Nevada Gaming Control Board informally advised them that any application for a gambling license on behalf of a corporation in which they held a major interest would be denied. Thereafter Polizzi and Zerilli, acting covertly through petitioners Bellanca and Shapiro, purchased the controlling interest in VFI and caused election of a board of directors that would carry out their orders concerning the operation of the enterprise. Throughout 1966 and 1967, Polizzi, Zerilli, Bellanca, and Shapiro made all the major corporate decisions. In June 1967, the Nevada gaming authorities conducted a hearing into the gambling application of VFI and its stockholders, but petitioners were successful in concealing Polizzi's and Zerilli's control and participation in the management of the corporation.

The other petitioners—Rooks, Giordano, and Emprise Corporation—participated in the conspiracy by loaning money to VFI at Zerilli's request. In April 1966, Emprise Corporation[4] loaned petitioner Rooks approximately one-half million dollars to purchase stock in VFI; this loan was arranged by

[4] Prior to March 17, 1970, petitioner Emprise Corporation was named "High Park Corporation." Until March 1, 1970, High Park Corporation owned all the shares of another New York corporation, also named "Emprise Corporation." On March 1, 1970, the former Emprise merged into High Park Corporation, and on March 17, 1970, High Park changed its name to Emprise Corporation. All references to Emprise Corporation's participation in the conspiracy are to the acts of the former Emprise Corporation. The liability of petitioner Emprise Corporation for the acts of its predecessor namesake corporation is discussed at pp. 20–21, *infra*.

Zerilli and Bellanca to assist their purchase of a controlling stock interest in the corporation. Rooks was a "front man" who was investing on behalf of his co-conspirators. Emprise Corporation on two other occasions made substantial loans to Zerilli, Bellanca, and others to insure the success of the conspiracy's objective. In later stages of the conspiracy, when further funding by Emprise would have risked exposure of the conspiracy, Giordano lent funds to Zerilli on two separate occasions.

ARGUMENT

1. Petitioner Emprise Corporation contends (Pet. 9–14) that the Travel Act, 18 U.S.C. 1952, which proscribes generally the use of interstate facilities to carry on a gambling enterprise in violation of state law, nevertheless does not reach the use of such facilities to carry on a gambling enterprise in violation of a state law that prohibits the sharing in the proceeds of such an enterprise by persons whose identities have not been disclosed in the application for a gaming license. This contention was properly rejected by the court of appeals in an opinion (Pet. App. A–4 to A–12; 500 F. 2d at 869–874) upon which we rely.

After analyzing the appropriate Nevada statutes, the court of appeals concluded that the gambling enterprise carried on by petitioners violated the criminal law of Nevada because its proceeds were distributed without compliance with applicable disclosure requirements. Petitioners do not argue that the court of appeals misinterpreted or misapplied Nevada law. Rather, the claim is that the violation was relatively

minor and did not relate directly to the actual conduct of the gambling enterprise. Although characterization of the state offense as minor is of doubtful accuracy—it was punishable by a fine of not less than $1,000 or imprisonment for not less than six months, or both (see Pet. App. A–10, n. 15; 500 F. 2d at 873, n. 15)—the seriousness of the state offense is in any event irrelevant under the Travel Act, which is concerned solely with whether the activity was lawful or unlawful. And the distribution of proceeds is of course integral to the conduct of a gambling enterprise. Furthermore, petitioners' failure to disclose strikes at the heart of Nevada's regulation of gambling:

> For gambling to take its place as a lawful enterprise in Nevada it is not enough that this state has named it lawful. We have but offered it the opportunity for lawful existence. The offer is a risky one, not only for the people of this state, but for the entire nation. Organized crime must not be given refuge here through the legitimatizing of one of its principal sources of income. Nevada gambling, if it is to succeed as a lawful enterprise, must be free from the criminal and corruptive taint acquired by gambling beyond our borders. If this is to be accomplished not only must the operation of gambling be carefully controlled, but the character and background of those who would engage in gambling in this state must be carefully scrutinized.
>
> * * * The risks to which the public is subjected by the legalizing of this otherwise unlawful activity are met solely by the manner in which licensing and control are carried out.

[*Nevada Tax Commission* v. *Hicks*, 73 Nev. 115, 119–120, 310 P. 2d 852, 854.]

The Travel Act was expressly designed to overcome the difficulties encountered by the states in enforcing gambling and other similar criminal laws. *Rewis* v. *United States*, 401 U.S. 808, 811.[5] Accordingly, the Travel Act was properly interpreted and applied here.

2. Petitioner Emprise Corporation contends (Pet. 15–16) that the district court gave an erroneous instruction regarding the specific intent required to prove a conspiracy to violate the Travel Act. That contention is based upon the erroneous assumption that the Travel Act requires that the accused intend personally to commit a violation of state law. But, as the court of appeals correctly demonstrated (Pet. App. A–16, C–2; 500 F. 2d at 876–877), neither the language nor the purpose of the Act supports such a construction. The only intent required by the Act is

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[5] *United States* v. *Archer*, 486 F. 2d 670 (C.A. 2), and *United States* v. *Gordon*, 464 F. 2d 357 (C.A. 9), cited by petitioner Emprise Corporation (Pet. 12–14), are inapposite. *Archer* involved corruption in a local prosecutor's office and had no interstate aspects. *Gordon* held only that 18 U.S.C. 1955 does not encompass violations of state civil law.

Petitioner Emprise Corporation also contends (Pet. 27–28) that its conviction should be reversed because the jury may have convicted on the theory, which the court of appeals held to be invalid, that the defendants violated Nevada law because they did not hold gambling licenses. This contention is without merit. The trial court charged the jury that "any gambling conducted by or through VFI would not be illegal," because the corporation itself was licensed (Pet. App. A–6, n. 6; 500 F. 2d at 870, n. 6). There was therefore no question concerning petitioners' failure to obtain licenses individually (see Pet. App. A–6; 500 F. 2d at 870–871).

the intent to facilitate the carrying on of an activity or enterprise that is itself known by the accused to be in violation of state law. That was the holding below.[6] Petitioner Emprise Corporation's statement that the decision below "does not require the prosecution to establish specific knowledge that local law has been violated" (Pet. 15) is incorrect.

3. Petitioners contend (Polizzi Pet. 18–21) that they were deprived of a fair trial by prejudicial publicity both before and during the trial and that the trial judge failed to take adequate measures to detect and prevent that prejudice. This contention was correctly rejected by the court of appeals for the reasons stated in its opinion (Pet. App. A–19 to A–33; 500 F. 2d at 878–887), upon which we rely. The court, after reviewing the evidence relating to publicity, concluded that "the pretrial publicity * * * was not substantial enough to have required the trial judge to interrogate the prospective jurors at length about it" (Pet. App. A–21; 500 F. 2d at 880) and that the trial judge's careful admonitions and *in camera* interrogations of the individual jurors concerning publicity during trial fully protected petitioners against prejudice.

In a related contention, petitioners argue (Polizzi Pet. 21–24) that their right to counsel was violated

[6] Contrary to petitioner Emprise Corporation's claim, the decision below does not conflict with *United States* v. *Stagman*, 446 F. 2d 489 (C.A. 6). The court in *Stagman* merely rejected the argument that the Travel Act "does not require knowledge that the *activity* is unlawful" (446 F. 2d at 492; emphasis added). Petitioners here were shown to have known that the gambling activity was unlawful.

when the district judge questioned jurors *in camera*, but on the record, about prejudicial publicity. This contention may not have been properly raised in the court of appeals.[7] Cf. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. In any event, the contention is without merit. It was within the trial judge's discretion to question jurors privately about the possible effect of prejudicial publicity in order to reduce the adversary atmosphere that the presence of six defendants and their counsel would have created. Furthermore, any possible prejudice was obviated by the presence of a court reporter, who transcribed the conversations. *United States* v. *Jorgenson*, 451 F. 2d 516 (C.A. 10), certiorari denied, 405 U.S. 922.[8]

[7] Petitioners attempted to raise this issue in a supplemental petition for rehearing with suggestion for rehearing *en banc*, which the court of appeals denied (Emprise Pet. App. D).

[8] The cases cited by petitioners are inapposite. In *United States* v. *Glick*, 463 F. 2d 491, 494 (C.A. 2), the trial judge had delivered to the jury a "highly prejudicial" and erroneous instruction without counsel being present. In *United States* v. *Palladino*, 475 F. 2d 65, 75 (C.A. 1), the court stated in dictum that counsel should have been present when the jury was questioned, citing *United States* v. *Larkin*, 417 F. 2d 617, 618 (C.A. 1), which held a similar absence of counsel to be harmless error. In *United States* v. *McCoy*, 429 F. 2d 739, 742 (C.A.D.C.), when the jury was polled, one juror answered "yes, with a question mark." The conviction was reversed because the juror was subsequently questioned by the court alone, without the defendant, his attorney, or even a court reporter. In *United States* v. *Smith*, 411 F. 2d 733, 736–737 (C.A. 6), the conviction was reversed because the verdict was taken in the absence of defense counsel.

4. Petitioners contend that they were prejudiced because Polizzi and Zerilli were included on a Department of Justice list of known Mafia figures (Polizzi Pet. 13, 17), because the term "Mafia" was used once before the grand jury that returned the instant indictment (Polizzi Pet. 13–14), and because the government asked Polizzi on cross-examination about his reputation, to which Polizzi answered that he was considered a member of the Mafia (Polizzi Pet. 14–15). These contentions were correctly rejected by the court of appeals for the reasons stated in its opinion (Pet. App. A–33 to A–37, C–2-C–3; 500 F. 2d at 887–889). The court determined that the alleged Mafia connections of Polizzi and Zerilli had neither prompted initiation of the prosecution nor biased the grand jury. The court also pointed out that the question asked of Polizzi on cross-examination had been proper and could have been answered truthfully without mention of the Mafia.

Petitioners additionally complain of the prosecutor's reference to the Mafia during his summation. The prosecutor stated (Appellants' Opening Brief below, pp. 166–167):

> All this business that you have heard about the Mafia in this case, and the reason why Mr. Polizzi says he couldn't get licensed, and which is the actual reason * * * let me say this * * * That evidence would never have had to come into this case except for the defense that was advanced, it would never have been mentioned, never.

It is difficult to see how this statement prejudiced the jury against petitioners. Polizzi himself had brought up his alleged connection with the Mafia. The prosecutor was simply trying to make it clear to the jury that the government placed no weight on any such allegation and was prosecuting petitioners only for the specific acts proven at trial.

5. Petitioners contend (Polizzi Pet. 36–38) that the government improperly used a prior statement (the Lands transcript) to rehabilitate Maurice Friedman,[2] the government's chief witness, and (Polizzi Pet. 34–36) that Friedman's testimony should have been stricken because the late disclosure of the Lands transcript violated the Jencks Act, 18 U.S.C. 3500. These contentions were correctly rejected by the court of appeals for the reasons stated in its opinion (Pet. App. A–44 to A–48, C–4; 500 F. 2d at 893–896). The court concluded (1) that since the probative value of the Lands transcript as a prior consistent statement was insubstantial and its references to the Mafia and Cosa Nostra were potentially prejudicial, the trial court erred in admitting testimony with respect to it, but (2) that the error was harmless in view of the fact that Friedman avoided reference to the prejudicial material in his testimony with respect to the transcript and was subjected to intense and effective cross-examination that brought out the weakness of the transcript as a prior consistent statement. The court further determined that petitioners were not prejudiced by untimely disclosure of the transcript,

[2] Maurice Friedman was the principal promoter of the Frontier Hotel venture and was a shareholder and member of the board of directors of VFI.

since it had been immediately made available to them when its relevance became apparent upon cross-examination."[10]

6. Petitioners contend (Polizzi Pet. 38–41) that the government failed to disclose promises of leniency made to Maurice Friedman. The court of appeals reviewed petitioners' evidence and arguments on this point and correctly determined that the prosecution made no undisclosed promises to Friedman (Pet. App. A–48 to A–50, C–3, C–4; 500 F. 2d at 896).

Petitioners now allege two newly discovered instances of supposedly favored treatment of Friedman. Neither instance involved any agreement nor in fact involved favored treatment. (1) The misconduct investigation against Friedman at the Lompoc Prison Camp was dropped because there was no evidence that Friedman had done anything wrong. As the prosecutor stated during the trial that resulted from the misconduct investigations, "I have been told that there is absolutely no understanding between Mr. Friedman and anyone in the government that he would not be prosecuted [for any part he may have played in official misconduct at the Lompoc Prison Camp]" (Brief

[10] The thrust of petitioners' complaint about the failure to receive the Lands transcript prior to cross-examination seems to be that earlier disclosure would have prevented defense counsel from asking Friedman, "Isn't it true that the first time you told anybody there was a hidden interest was after your conviction for perjury?" Although defense counsel might not have asked this question, they would certainly have attempted to establish a motive to fabricate by asking Friedman about alleged promises of prosecutorial leniency (see pp. 13–14, *infra*), and the government still would have been able to use Friedman's prior statement to rebut the inference of recent fabrication.

for the United States in *United States* v. *Allessio*, No. 73-2904 (C.A. 9), p. 61, n. 21). (2) Friedman was housed in an apartment rather than in jail before and during the instant trial to ensure his safety. The apartment was always guarded, and a United States marshal remained in the apartment with Friedman.

7. Petitioners Zerilli, Polizzi and Giordano were subject to warrantless electronic surveillance between 1962 and 1965. Although the conspiracy here was instituted only later, in 1966, the district court held an *Alderman* hearing to determine whether the trial had been materially tainted by the unlawful surveillance. Petitioners contend (Polizzi Pet. 24-34) that the district court erred in finding no taint. We rely upon the discussion of the court of appeals rejecting that contention (Pet. App. A-71 to A-78, C-3 to C-4; 500 F. 2d at 909-913). The court carefully considered the record and concluded that petitioners had failed to "go forward with specific evidence demonstrating taint" (*Alderman* v. *United States*, 394 U.S. 165, 183); the court further held that it had not been error not to require the testimony of all FBI personnel who had monitored their conversations, in view of the fact that the prosecutors' own testimony showed that "no member of the prosecution team had read the logs or had any information derived from them when the indictments were handed down" (Pet. App. A-77; 500 F. 2d at 913).

We add only that petitioners err in contending (Polizzi Pet. 32) that the decision below conflicts with those of other courts of appeals on the question

whether FBI monitors must testify at *Alderman* hearings. The decisions cited by petitioners involve, at most, instances where denial of a suppression motion has been affirmed in part on the basis of the testimony of FBI monitors. As the court of appeals below noted, "[w]hile FBI monitors have testified at some taint hearings, there is no rule that they must testify" (Pet. App. A–78, C–4; 500 F. 2d at 913).

8. Petitioners contend (Polizzi Pet. 41–48; Emprise Pet. 21–28) that the cumulative effect of numerous harmless trial errors resulted in the denial of a fair trial and that the court of appeals did not appreciate this cumulative effect because no one judge wrote the entire opinion. This contention is without merit. The panel issued a unanimous opinion, each judge joining in the parts written by the other two judges, and the court explicitly stated (Pet. App. A–43; 500 F. 2d at 892):

> In this case the trial judge clearly did his best to give appellants a fair trial. *Compare United States* v. *Dellinger,* 472 F. 2d 340, 385–391 (7 Cir. 1972), *cert. denied,* 410 U.S. 970 (1973). Errors were committed, but none so prejudicial, so fatal, either individually or collectively, as to require reversal. * * * Appellants have failed to make a persuasive showing that their constitutional rights were violated, and our careful review of the entire record does not lead to a reasonable inference that the jury's verdicts were the end result of anything other than an impartial consideration of properly admitted evidence.

9. Petitioner Giordano contends (Pet. 18–26) that the evidence was insufficient to sustain his conviction, that telephone and hotel records were improperly admitted into evidence,[11] and that the testimony of two adverse witnesses called by the government established his innocence. These contentions were thoroughly considered and properly rejected by the court of appeals (Pet. App. A–61 to A–65; 500 F. 2d at 903–906).

The court of appeals reviewed the evidence against Giordano in considerable detail and concluded that the jury could properly have found that Giordano joined the conspiracy, arranged for an investment of $150,000 in VFI, and travelled to Las Vegas to watch over his hidden interest in VFI and to participate in various key decisions. The court also held that telephone and hotel records were properly submitted as circumstantial evidence tending to show, along with other circumstantial evidence, Giordano's participation in the conspiracy. Regarding the alleged exculpatory testimony of the two adverse witnesses called by the government, the court of appeals correctly noted that the notion that a party is bound by the

[11] Petitioner Giordano's related contention (Pet. 32–35), that he was prejudiced by pre-indictment delay due to the routine destruction of other hotel records, is frivolous. His claim is merely that such records might have refreshed his recollection of why, and with whom, he had travelled to Las Vegas. This bare claim falls far short of showing "that the pre-indictment delay * * * caused substantial prejudice to [petitioner's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *United States* v. *Marion*, 404 U.S. 307, 324.

testimony of its witnesses has long been discredited. See also *Chambers* v. *Mississippi*, 410 U.S. 284, 296.

10. Petitioner Giordano also contends (Pet. 27–32, 39–42) that the district court abused its discretion in denying his motions for severance. This contention is without merit for the reasons stated by the court of appeals (Pet. App. A–57 to A–60; 500 F. 2d at 901–902). The court correctly observed that "a joint trial is particularly appropriate where conspiracy is charged" (Pet. App. A–58; 500 F. 2d at 901), that "it is difficult to understand how Giordano could have benefited from severance, for evidence of the acts and statements of other defendants pursuant to and in furtherance of the conspiracy would have been admissible against Giordano if tried alone" (*ibid.*), and that "[t]he trial judge took great pains to protect Giordano's right to an independent evaluation by the jury of the evidence against him" (Pet. App. A–59; 500 F. 2d at 902).[12]

[12] The cases cited by petitioner are inapposite. In *United States* v. *Spector*, 326 F. 2d 345 (C.A. 7), the only link between the conspiracy and substantive counts was a common co-defendant. The court held that this link was insufficient to warrant a joint trial. In the instant case the substantive counts involved acts committed pursuant to the conspiracy. In *United States* v. *Kelly*, 349 F. 2d 720, 756–759 (C.A. 2), the co-defendant aggrieved by the joinder was not even mentioned during the first two months of trial, proof of his participation in the conspiracy was "tenuous and unsubstantial", and there was no effort by the trial judge to distinguish him from the other defendants. In the instant case petitioner Giordano was proven to have been an important source of funds for the conspiracy by substantial, albeit circumstantial, evidence, and, as the court of appeals pointed out, the trial judge took great pains to pro-

11. Petitioner Giordano further contends (Pet. 35–39) that the court should have instructed the jury not to consider as to him evidence admitted after he had rested at the close of the government's case. This contention also is answered by the opinion of the court of appeals (Pet. App. A-60 to A-61; 500 F. 2d at 902–903):

> Giordano rested at the close of the government's case-in-chief. He asked for a jury instruction that no evidence introduced thereafter could be considered against him. The request was denied. Giordano's co-defendants then testified in their own defense. In arguing the case to the jury, the government drew implications from this testimony adverse to Giordano.
>
> Giordano's decision not to offer evidence in his own behalf preserved his right to a review of the denial of his motion for acquittal on the basis of the government's evidence alone. *See United States* v. *Figueroa-Paz*, 468 F. 2d 1055, 1058 (9th Cir. 1972). But this is not to say, if denial of the motion to acquit was

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tect his right to an independent evaluation of the evidence against him. In *United States* v. *Branker*, 395 F. 2d 881, 887–889 (C.A. 2), the prosecution relied upon the conspiracy charge to join eight defendants in a case involving an additional 80 substantive counts. During the trial the conspiracy count was dismissed, and because the case was so complex, making it difficult for the jurors to keep the various defendants separate in their minds, the court held that four of the defendants should have been severed for trial on the substantive counts. In the instant case Giordano was charged only in the conspiracy count, which was not dismissed during trial. In *United States* v. *Harris*, 458 F. 2d 670, 672–674 (C.A. 5), the court upheld the denial of severance, holding that the defendants had the burden of proving prejudice from the joinder and that the mere sitting together during trial did not carry that burden.

proper, that the jury was not entitled to consider *all* of the evidence, including that presented by Giordano's co-defendants, in determining Giordano's guilt.

Evidence offered in defense in the trial of a single defendant is available for all purposes, and the rule is the same in a joint trial of multiple defendants—evidence offered by one may support the conviction of the others. *See Rickey* v. *United States,* 242 F. 2d 583, 586 (5th Cir. 1957); *Maupin* v. *United States,* 225 F. 2d 680, 682 (10th Cir. 1955). This court has held that the same rule is applicable even to a defendant who has rested at the close of the government's case, and an instruction of the kind sought by Giordano is therefore properly refused. *Brown* v. *United States,* 56 F. 2d 997, 999–1000 (9th Cir. 1932).

There is a substantial reason for the rule. One purpose of a joint trial of defendants allegedly involved in a single scheme is to facilitate evaluation by the jury of the evidence against each defendant in light of the entire course of conduct. "Such procedure not only increases the speed and efficiency of the administration of justice but also serves to give the jury a complete over-all view of the whole scheme and helps them to see how each piece fits into the pattern." *Rakes* v. *United States,* 169 F. 2d 739, 744 (4th Cir. 1948). *See* ABA Standards Relating to Joinder and Severance 39 (Approved Draft 1968). This purpose of joinder would be frustrated as to a particular defendant if he could bar consideration as to him of some of the relevant evidence by resting before that evidence was introduced. [Footnotes omitted.]

12. Finally, petitioner Emprise Corporation contends (Pet. 17–21) that it is not liable under the Travel Act for criminal acts committed by its former subsidiary. This contention was correctly rejected by the court of appeals (Pet. App. A–66 to A–70; 506 F. 2d at 906–909), which pointed out that the governing state law expressly makes the corporation surviving a merger responsible for the liabilities, obligations, and penalities of the corporations absorbed in the merger.[13]

Petitioner errs in suggesting that the decision below conflicts with *United States* v. *Carter*, 311 F. 2d 934 (C.A. 6), certiorari denied, 373 U.S. 915. Although the Sixth Circuit in *Carter* did express its view that an acquiring corporation would not be liable for the prior criminal acts of an acquired corporation, that issue was not before the court, and its statement did not form the basis of its decision. The court there reversed the conviction of an acquiring corporation because the corporation had been charged and tried on the theory that it had committed the offense itself and the evidence was insufficient to establish the charge (311 F. 2d at 941).[14] Here, by contrast, petitioner

[13] Although the court of appeals did not note it, Bus. Corp. Law § 906(b)(3), McKinney's Consolidated Laws of New York Annotated, which provides for the carryover of liabilities, in its last sentence refers expressly to criminal as well as civil proceedings. It is therefore clear that the statute makes the surviving corporation both criminally and civilly liable for prior acts of its merged constituent.

[14] The acquired corporation was separately charged and convicted, and its conviction was upheld in *Carter* (311 F. 2d at 941-944).

Emprise Corporation was charged as a successor corporation and tried on that theory.

Moreover, the policy considerations upon which petitioner relies as arguably showing the undesirability of attaching criminal liability to the innocent survivor of a merger between two unrelated corporations obviously have no application where, as here, the offense was committed by the former subsidiary of the surviving parent.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

No. 74-283

EMPIRE CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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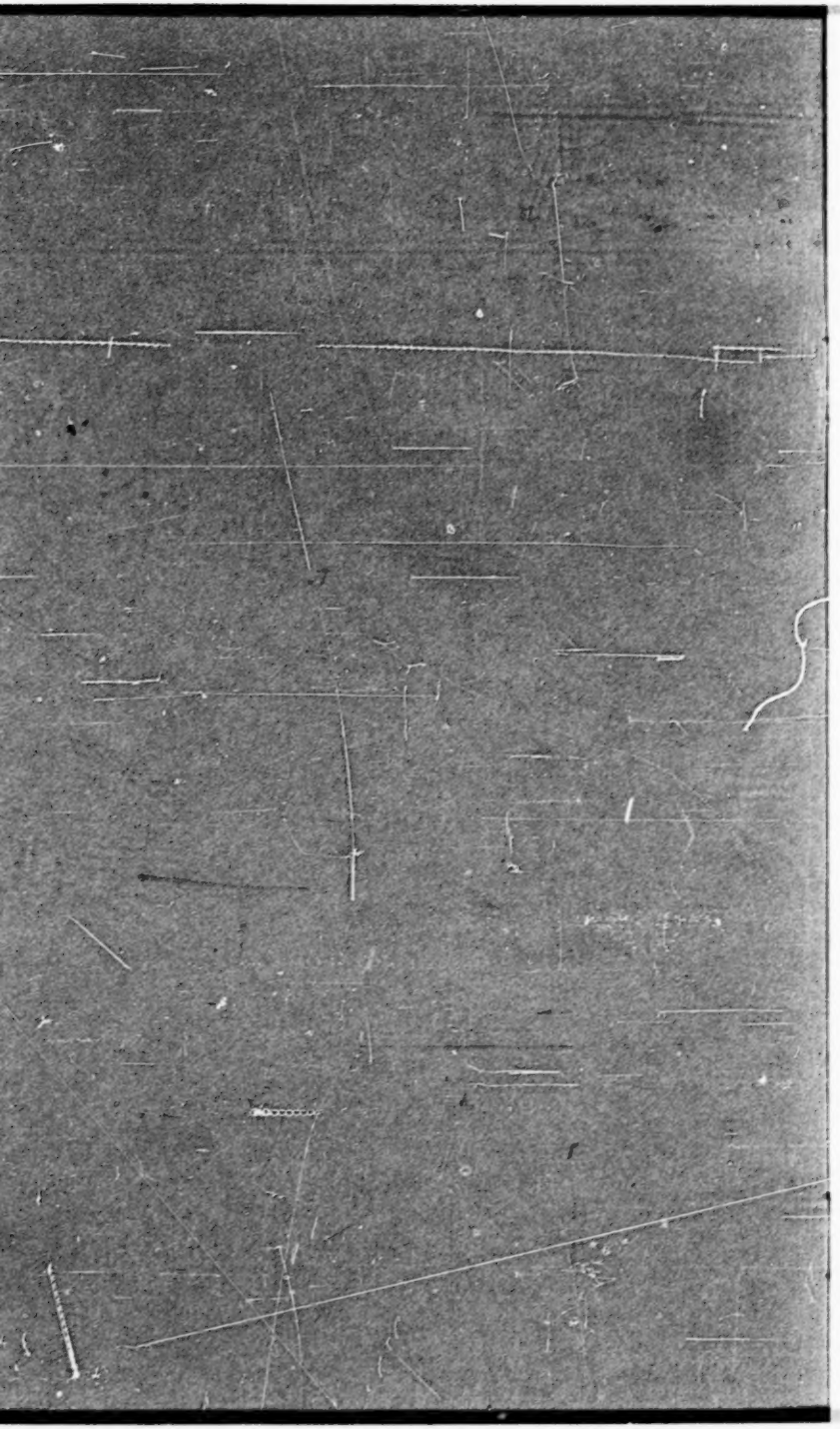

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PETITIONER'S REPLY BRIEF

The Solicitor General's Brief in Opposition, which was due to be filed (after an extension of time) on December 12, 1974, was not received by counsel for Emprise Corporation until more than three weeks later, on Saturday, January 4, 1975. The case has nevertheless been placed on the Court's calendar for the conference of January 10. We respectfully submit that petitioner cannot adequately answer, and the Court could not adequately consider, the many points raised by the Solicitor General's brief in the few days between the receipt of his brief and the conference.

We will nevertheless attempt to answer in abbreviated form a few of the major points raised by the Solicitor General.

1. The Solicitor General treated quite cavalierly, in a few paragraphs, the issue of the scope of The Travel Act.

In an attempt to make the alleged violation of the Act involved here seem as far-reaching and pervasive as possible, the Government repeatedly speaks of that violation in terms of the "distribution of proceeds" from an illegal activity. Brief in Opposition at 2, 6, 7. The Court of Appeals, however, did not view the case in that light. It thought the illegality lay in the fact that "the interests" which two persons allegedly had in legal gambling conducted at the Frontier Hotel in Las Vegas "were hidden from the Nevada gaming authorities." App. 6a; see also App. 10a-11a, 12a. The Government and the Court of Appeals cannot both be right.

Moreover, the Government candidly admits that under its view, "the seriousness of the state offense is * * * irrelevant under the Travel Act * * *." Brief in Opposition at 7.[1] As we pointed out in our petition

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[1] The Government attempts to distinguish *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973), on the ground that that case "involved corruption in a local prosecutor's office and had no interstate aspects." Brief in Opposition at 8 n. 5. The Government's characterization simply is not accurate. The prosecution in *Archer* proved three uses of interstate facilities directly connected with the alleged crime. The court found these uses either Government-inspired or too incidental to make a federal crime out of what was essentially local corruption

The Government also says in this section of its brief that "no question concerning petitioners' failure to obtain licenses individually" was involved in the case. *Id.* The Court of Appeals thought otherwise. It described "the Government's contention

(p. 11), this approach can make a federal crime out of having one instead of three fire exits in a gambling casino, or in requiring employees of such a casino to work on twelve-hour shifts.

Exactly the opposite approach to the Travel Act has been taken by the District of Columbia Circuit in a case decided after the filing of our petition. *United States* v. *Lightfoot*, No. 73-1785, October 18, 1974. In that case the defendant was charged with and convicted of a wide variety of offenses, including pandering, violating the Mann Act, and receiving stolen property, as well as with violating the Travel Act. Even though the defendant had purchased a car with funds derived from prostitution and driven the car interstate, and even though the Travel Act prohibits "distribut[ing] the proceeds of [an] unlawful activity," Judges McGowan, Edwards and Tamm refused to find a violation of the Act. They held instead that the word "distribute" in the Act "carries a connotation of distribution of illegal proceeds to persons in organized crime conspiracies." Slip Opinion at 7. Such a construction would have precluded any conviction of the defendants in the instant case under the evidence and the instructions to the jury, even if the Government were correct that a "distribution of proceeds" is the key to the offense.

2. The Government concedes that the opinion in *United States* v. *Carter*, 311 F.2d 934, 941 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963), conflicts with the de-

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[as being] that all persons with a direct or indirect interest in a gambling casino must be licensed. We find no such requirement in Nevada law." *Id.* at 11a; footnote deleted. More importantly, the Government contended both in the indictment and in its closing argument to the jury that the violation lay in the failure to obtain gambling licenses. 39 R.T. 7902-94, 43 R.T. 8693-95.

cision below on the question of corporate liability for acts of an acquired corporation. It insists that what the court said in *Carter* "did not form the basis of its decision" (Br. in Opp. 20). The fact is, however, that what the court said was nothing less than an alternative holding.[2]

More important than any conflict with *Carter*, however, is the total irreconcilability of the decision below with basic principles which this Court has insisted upon for vicarious liability even in areas requiring less constitutional vigilance than the criminal law. For successor liability under the National Labor Relations Act, the Court in *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168 (1973), required "knowledge [by the buyer] that the wrong remained unremedied" as a precondition for liability. 414 U.S. at 180; *see also* 414 U.S. at 182-183 n.5.

This issue, moreover, is critical for Emprise and has significance in many States beyond New York. Already, petitioner's subsidiaries have lost a liquor license in Oregon, lost a concession in Illinois, and seen interests in Arizona racetracks placed in trust as a result of this conviction. See *In re Petition for Rehearing of East St. Louis Jockey Club, Inc.*, 5 CCH Trade Reg. Rep. ¶ 50,165, at 55,291-92 (Ill. Racing Bd., Feb. 23, 1973). Statutes with phrasing identical or similar to the New York Corporation Law in this case exist in several States. Connecticut tracks New York's "liabilities,

[2] The Government also attempts to distinguish *Carter* on the ground that there the corporation was itself charged with a crime and the evidence was insufficient, whereas here Emprise was guilty because charged as a successor corporation.. This position leads to the extraordinary result that Emprise could not have been convicted if charged itself but can be convicted if not charged itself and if the evidence related entirely to another company.

obligations and penalties" wording. Conn. Gen. Stat. Ann. ¶ 33-369(e) (Cum. Supp. 1973). And Delaware, Kansas and Nevada, to give further examples, all use a phrasing subject to similar interpretation—"restrictions, disabilities and duties." 8 Del. Code Ann. § 259(a) (Cum. Supp. Pam. 1968); Kan. Stat. Ann. § 17-6709 (Cum. Supp. 1973); Nev. Rev. Stat. § 78.495(1) (1973).

The question, in sum, is fully worthy of this Court's attention. We are reminded of the observation of Mr. Justice Story in a letter to Charles Sumner after a Circuit Justice had held that corporations could not do business outside their State of incorporation:

> My brother, McKinley, has recently made a most sweeping decision in the circuit court in Alabama which has frightened half the lawyers and all the corporations in the country out of their proprieties. [2 C. Warren, *The Supreme Court in United States History* 324 (1922).]

A second and better thought reversed that decision. *Bank of Augusta* v. *Earle*, 38 U.S. (13 Pet.) 519 (1839).

3. We must take cognizance of the assertion by the Government that "It was within the trial judge's discretion to question jurors privately about the possible effect of prejudicial publicity in order to reduce the adversary atmosphere that the presence of six defendants and their counsel would have created." Brief in Opposition at 10. We need only say that this is an entirely new and shocking assertion, directly contrary to the authority cited in our petition and to traditional constitutional doctrine. We also note that it is totally unsupported by any authority cited by the Solicitor General.

In the single case referred to by him, *United States v. Jorgenson,* 451 F.2d 516, 520-521 (10th Cir.), *cert. denied,* 405 U.S. 922 (1972), the entire transcript of the conversation between the court and a single juror was immediately read to counsel and defendants. Defense counsel not only failed to object but explicitly stated that he had no objection to the juror remaining on the panel. *Id.* The court quoted the rule to be that " 'we can let stand no conviction where the defendant was not present at all stages of the proceedings unless the record completely negatives any reasonable possibility of prejudice arising from such error.' " *Id.* That is not this case.

4. Because of the time strictures imposed upon us, we must rely upon our petition to answer the remaining points in the Solicitor General's brief.

Respectfully submitted,

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